Supreme Court, U. S.
FILED
MAY 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1683

UNITED TELEGRAPH WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

WESTERN UNION CORPORATION;
TELEPROCESSING INDUSTRIES, INC.;
WESTERN UNION DATA SERVICES COMPANY, INC.;
WESTERN UNION REALTY CORPORATION;
GIFTAMERICA, INC.;
THE WESTERN UNION TELEGRAPH COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
PRIOR TO THE 1970 WESTERN UNION CORPORATE TRANSFORMATIONS	4
CORPORATE TRANSFORMATIONS IN 1970 AND THEREAFTER	6
ALJ DECISION	9
BOARD DECISION	11
DECISION BELOW	14
REASONS FOR GRANTING THE WRIT	16
I. THIS CASE PRESENTS ISSUES OF GENERAL IMPORTANCE AND THE JUDGMENT BELOW CONFLICTS WITH THE SOUTH PRAIRIE HOLDING OF THIS COURT	16
II. THE DECISION BELOW IS IN CONFLICT WITH OTHER DECISIONS OF THIS COURT PROSCRIBING JUDICIAL RUBBER STAMPING OF BOARD DECISIONS AND PRESCRIBING ESSENTIAL STANDARDS FOR PROPER JUDICIAL REVIEW	19
CONCLUSION	23
APPENDIX A - Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit	1a
APPENDIX B - Decision and Order of the National Labor Relations Board	25a

TABLE OF CONTENTS CONTINUED

	Page
APPENDIX C - Decision of the Administrative Law Judge	55a

TABLE OF CASES

N.L.R.B. v. Brown, 380 U.S. 278 (1965)	19-20
N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251 (1975)	19-20
N.L.R.B. v. Walton Manufacturing Company, 369 U.S. 404 (1962) . .	21
South Prairie Construction Company v. Local No. 627, International Union of Operating Engineers, 425 U.S. 800 (1976), affirming on the single employer issue, Local No. 627, International Union of Operating Engineers v. N.L.R.B., 171 U.S. App.D.C. 102, 518 F.2d 1040 (1975) ("South Prairie")	13,15 17-19
Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474 (1951)	20-21, 22

STATUTES

28 U.S.C. §1254(1)	2
29 U.S.C. §158	3

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, United Telegraph Workers, AFL-CIO ("UTW"), respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered herein on February 24, 1978.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit issued on February 24, 1978 and is reported at 571 F.2d 665. The June 1, 1976 Decision of the Respondent National Labor Relations Board ("Board") is reported at 224 NLRB 274 (1976). The Decision of the Administrative Law Judge ("ALJ"), issued on January 10, 1975, is included (save for the Appendix) in the Board Decision, at 224 NLRB 279. Each of the foregoing is set forth in the Appendix ("App."), infra.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on February 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

When a corporate employer with a long-established collective bargaining relationship transforms itself into a holding company and then transfers various of its departments and units to new, wholly-owned

corporate subsidiaries, which could not have been formed without its resources and personnel, may the corporate family thus created refuse to bargain with the established collective bargaining representative with respect to the work and employees of the job classifications embraced by the long-established collective bargaining relationship?

STATUTORY PROVISION INVOLVED

The pertinent statutory provision is the following in Section 8, 29 U.S.C. §158, of the National Labor Relations Act, as amended, 29 U.S.C. §§141 et seq. ("Act"):

> "(a) It shall be an unfair labor practice for an employer --
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *
>
> "(5) to refuse to bargain collectively with the representative of his employees * * * ."

STATEMENT OF THE CASE [1]

PRIOR TO THE 1970 WESTERN UNION CORPORATE TRANSFORMATIONS

For more than a score of years before 1970, Petitioner UTW represented the employees of Respondent The Western Union Telegraph Company ("Western Union") in a bargaining unit certified by the Board covering virtually the entire continental United States and encompassing virtually all "employees" subject to the Act. The many successive collective bargaining contracts extended, for present purposes, to all of the organizational departments and job classifications of Western Union, including a multitude of different types and varieties of clerical, production, maintenance and technical work.

For more than a century, Western Union had been an enormous, multi-faceted self-sufficient, independent corporation

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1. The facts stated herein are according to the findings of the ALJ. As the ALJ's Decision and the contrasting, conclusory Opinions of the Board and Court majority make clear, the ALJ's findings were the only ones based upon the entire record with its thousands of pages of documents and the testimony of some 17 witnesses.

in the electronics and communications industry. From its historical base in the public telegram business, it had expanded into multifarious additional business pursuits. It had established a Real Estate Department to provide the property services required by its nationwide operations at thousands of separate office, shop, traffic and laboratory locations. Western Union's Marketing Department was aggressively seeking fresh activities and revenues. Through intensive research and development activities, most recently under the organization and title of its Planning and Engineering Operation Department, Western Union had gained advanced technical and engineering expertise and know-how in the areas of communications and electronics, and was designing and operating the most scientifically advanced and sophisticated communications equipment and facilities utilizing computers. In addition to a wide variety of other services, Western Union provided delivery of particular gifts along with the traditional telegram.

CORPORATE TRANSFORMATIONS IN 1970 AND THEREAFTER

The sequence of corporate maneuvers which generated this case was initiated by Western Union's creating and selling all its stock in 1970 to a new corporation, Respondent Western Union Corporation ("WUC"). At its birth WUC was a holding company holding nothing more than Western Union: WUC was Western Union and Western Union was WUC. Thereafter, Western Union successively surrendered a number of its departments, functions and activities, which for collective bargaining purposes had all been within the jurisdiction of UTW, to newly created corporations. Western Union first shed its Real Estate Department, later in 1970, so that it could assume the legal form of Respondent Western Union Realty Corporation ("WURC"). Later in 1970 Western Union surrendered certain activities of its Marketing Department to the new corporation Respondent Western Union Data Services Company, Inc. ("DSC"). In 1971 Western Union spun off certain research, design and development functions performed in its Planning and Engineering Operation Department and lodged them in a new corporation

christened Respondent Teleprocessing Industries, Inc. ("TII"). Finally, in 1973 Western Union turned over the development of the various gift services in which it had been engaged to yet another brand-new wholly-owned WUC subsidiary, GiftAmerica, Inc. ("GA").

All the other corporate Respondents came into being and commenced operations only with the assets, business, personnel and other resources of Western Union. None of them could possibly have become operative without Western Union. All the operating Respondents including Western Union are now managed and administered, and are presented to their stockholders and to the public, as one integrated enterprise, a natural extension of Western Union.

As the holding company at the acme of Western Union power, WUC controls all the other corporate Respondents with the same sovereignty Western Union had previously exercised over its constituent departments and activities which were sundered to give life to the several other corporate Respondents. This economic enterprise is as integrated and centralized as it was be-

fore, albeit now donning separate corporate mantles. What is now the Western Union family of corporations has common officers and directors, and one dominant leader. The centralized control, exercised by WUC, extends to all matters, including a fortiori employee relations.

All the corporate Respondents participated together in the conduct which the ALJ found constituted a refusal to bargain. All the corporate Respondents were involved in and concerned with the collective bargaining contract negotiations between Western Union and UTW. They acted together to withhold information from UTW concerning their mutual purpose of fragmenting or destroying the UTW bargaining capacity.

When the UTW made inquiries about the new corporations and their impact on the jobs and employees in the UTW bargaining unit, the corporate Respondents provided no information until after the filing of a Charge and the issuance of a Complaint by the Board. Subsequently, in May 1973, the UTW requested that the corporate Respondents bargain; and upon their refusal to do so, proceedings were instituted and

progressed pursuant to the Act.

ALJ DECISION

Upon the basis of the testimony of witnesses and the other evidence before him, the ALJ Decision (App. at 55a, infra, 224 NLRB 279) was that the corporate Respondents had deliberately violated the Act. He found that the corporate manipulations reflected the effectuation of Western Union's long term goal of creating a single integrated electronic data communications system for the nation.[2] He detailed the history of the creation of these corporations, specifying how each had been carved out of the personnel, resources and activities of Western Union.[3]

The corporate Respondents made a deliberate decision to go non-Union, not to use the UTW personnel; the design was ostensibly to contract for their use during the initial period, while replacing the UTW employees with new, non-Union employees.[4]

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2. App. at 56a-57a, 62a-67a, 73a-77a, 224 NLRB at 279-280, 280-281, 282-283.

3. App. at 56a-58a, 73a-145a, 224 NLRB at 279-280, 283-294.

4. App. at 145a-164a, 224 NLRB at 294-298.

As part of this design, the corporate Respondents deliberately concealed their non-Union plans from the UTW.[5] Pursuant to this design, "nonunion employees replaced the union employees who had been performing in the past, and would be performing now, the bargaining-unit support work connected with the functions transferred from Western Union to WUC and the four new subsidiaries."[6]

Discussing the facts of record in intensive detail, and for each finding citing the pertinent portions of the testimony and extensive documentation of record which he demonstrated refuted the claims of the corporate Respondents and demanded support of the UTW Charge, the ALJ determined that the corporate Respondents constituted a single integrated enterprise and employer.[7]

The ALJ based his conclusions upon findings as to credibility of some of the principal witnesses called by the Respon-

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5. App. at 164a-172a, 224 NLRB at 298-299.
6. App. at 163a, 224 NLRB at 297.
7. App. at 178a-213a, 224 NLRB at 300-306.

dent corporations.[8] He found as clearly established common ownership and financial control, common management, central control of labor relations policies and interrelation of operations.[9] Consequently, the ALJ's conclusion of law was that the corporate Respondents had violated the Act by refusing to bargain with the UTW.[10]

BOARD DECISION

A bare 2-1 majority of the Board reversed the ALJ and directed the dismissal of the Complaint. In contrast with the painstaking and meticulous review of and citation to the record which was the hallmark of the ALJ Decision, the Opinion of the Board majority ran to conclusory, unsupported statements.[11]

The predicates of the Board majority Opinion were that the corporate metamorphoses in which Western Union voluntarily indulged did not affect either its busi-

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8. App. at 71a, 120a-121a, 147a-148a, 224 NLRB at 282, 290, 295.
9. App. at 180a-211a, 224 NLRB at 300-305.
10. App. at 211a-213a, 224 NLRB at 305-306.
11. App. at 25a-29a, 224 NLRB at 274.

ness or the established UTW bargaining unit of its employees. These assumptions cannot be reconciled with the facts of record, elucidated by the ALJ with specification after specification demonstrating that the activities in which the other corporate Respondents engaged were activities in which Western Union had engaged, and that each of the other corporate Respondents was entirely formed from, and wholly dependent for its operations upon, Western Union.

In addition to overlooking the virtually self-evident impact of the corporate transformations upon the previously functioning Western Union enterprise and businesses, the Board majority gave no indication they had confronted the fact that all the jobs which are now in the ostensible employ of the other corporate Respondents would have remained with Western Union and unquestionably in the UTW bargaining unit absent the corporate transformations. In asserting that there had been no impact upon the UTW bargaining unit from the corporate transformations, the Board majority simply disregarded the

plain facts of record establishing that WURC and TII did no more than continue the activities in which they had been engaging as Western Union Departments, while DSC and GA were each nothing more than extensions of business activities in which Western Union was itself already engaging. The congruence is marked in the record between the job functions and classifications existing in Western Union before the corporate transformations and those thereafter lodged among the corporate Respondents. All this the Board majority disregarded.

Moreover, the Board majority made no attempt to reconcile their conclusion with South Prairie Construction Company v. Local No. 627, International Union of Operating Engineers, 425 U.S. 800 (1976), affirming on the single employer issue, Local No. 627, International Union of Operating Engineers v. N.L.R.B., 171 U.S. App.D.C. 102, 518 F.2d 1040 (1975) ("South Prairie").

The dissenting Member, now the Board Chairman, would have adopted the Decision of the ALJ. As he pointed out, the ALJ

"has set forth in great and supporting detail the basis for his ultimate findings of fact that Respondent corporations, each and every one of them, formed from the financial and personnel resources of the Western Union Telegraph Company for the purpose of performing a function or functions formerly performed by that corporation constitute a single employer . . . . Throughout, control of the operations has remained in the hands of the people who controlled Western Union prior to the reorganization."[12] Fact by fact, and issue by issue, he specified the multitude of respects in which the majority had simply disregarded the record and asserted unsupported conclusions of their own.

DECISION BELOW

UTW filed a Petition for Review in the Court below pursuant to Section 10 of the Act. That Court, dividing 2-1, upheld the Board.[13]

The Court majority filed a brief Opin-

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12. App. at 43a-44a, 224 NLRB at 277.

13. App. at 1a, 571 F.2d 665.

ion abounding in conclusory statements, containing not even a suggestion of a basis or justification for the Board's overturning the ALJ Decision. Likewise, the Court majority attempted no reconciliation of their conclusion with South Prairie. While the dissenting Judge agreed that there was substantial evidence supporting the Board's conclusion that the elements of single employer status had not been established, he had reviewed the record sufficiently to be dissatisfied with the Board treatment of the case and to determine that the case should be returned to the Board for a requisite consideration of whether under alternative legal theories the facts of record demanded the conclusion that the corporate Respondents had violated the Act by refusing to bargain with the UTW.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS ISSUES OF GENERAL IMPORTANCE AND THE JUDGMENT BELOW CONFLICTS WITH THE SOUTH PRAIRIE HOLDING OF THIS COURT.

Issues of general importance which should be adjudicated by this Court are presented by this case which opens wide the door to new corporate techniques for evading the purposes and policies of the Act. Unless this Court elucidates the proper principles of labor law which must be adhered to by corporations and the Board alike, this case will generate scores of identical corporate manipulations with inevitable litigation and exacerbation of established collective bargaining relationships, until the rights of the affected employees gain the protection which Congress intended and provided in the Act. The manifest public importance of Western Union and of its business of written record communication guarantees that the Decision below will bear the stature of a leading case, a text for evasion of the Act, unless this Court speaks. The technique for evading the Act approved below -- simply carving up

particular departments or activities of a corporation and naming new corporations for them, all after creating a new holding company -- is all too facile to be resisted by the increasing number of corporate enterprises and conglomerates willing and eager to dilute or destroy the bargaining status and power of their employees.

To sanction such a device for evading the obligations of the Act is to elevate legal form over real world substance and to defy the plain Congressional intention of protecting employees' rights. There is no more justification for the Judgment below than there would be for a decision sustaining Western Union's directly creating a series of new corporations and simply transferring various of its established departments to those ostensibly new corporations, without first selling itself to a newly created holding company. This Court should not countenance such a flagrant violation of the Act.

In analysis and result, the Judgment below cannot be reconciled with South Prairie. In that case as in this, an ultimate issue was one of "single employer"

and fragmentation of the bargaining unit. There as here, the ALJ found a violation but the Board reversed. In that case, however, unlike this, the Court of Appeals genuinely considered the record and the ALJ Decision, and, accordingly, reversed the legal conclusion of the Board that the ostensibly separate employers in that case were not a single employer for purposes of the Act. On that issue, this Court affirmed. The Court of Appeals ruling, affirmed by this Court in South Prairie, emphasized that "the standard for evaluating such exercise of power [of common ownership or financial control] is whether, as a matter of substance, there is 'arm's length relationship found among unintegrated companies'" (171 U.S.App.D.C. at 108, 518 F.2d at 1046; emphasis added). There is nothing on this record to support any finding that there were any arm's length relationships among the corporate Respondents. Indeed, neither the Board majority nor the Court of Appeals majority makes any such assertion. To the contrary, the entire history and characteristics of the relationships among the corporate Respondents demonstrate that

they did not and could not operate at arm's length. Consequently, the Judgment below cannot be harmonized with this Court's holding in South Prairie.

II.

THE DECISION BELOW IS IN CONFLICT WITH OTHER DECISIONS OF THIS COURT PROSCRIBING JUDICIAL RUBBER STAMPING OF BOARD DECISIONS AND PRESCRIBING ESSENTIAL STANDARDS FOR PROPER JUDICIAL REVIEW

It is of manifest importance to the public interest in general and the development and enforcement of administrative law in particular to ensure that there is genuine rather than perfunctory judicial review of administrative actions. This case is an appropriate vehicle for a reiteration of that basic bulwark against arbitrary administrative action and inadvertent or deliberate administrative failure to conform to the statute as expressed and intended by the Congress, denying to the people rights which Congress established. It is timely and requisite that this Court reiterate that "[r]eviewing courts are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act."

N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975), quoting N.L.R.B. v. Brown, 380 U.S. 278, 291 (1965). Reviewing courts violate the law and call for the corrective instructions of this Court when, as in this case, they simply rubber stamp Board decisions that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." N.L.R.B. v. Brown, loc. cit. supra. The Judgment below is one that does run contrary to the language and tenor of the Act, and is a rubber stamp affirmance of a Board Decision which is inconsistent with the statutory mandates.

It merits emphasis that the ALJ, who concluded that the Act had been violated, heard live witnesses and based his findings in significant measure upon his determinations as to the witnesses' credibility. In disregarding this fact, the Court below transparently disregarded the teaching of this Court in Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, 495 (1951): "Nothing in the statutes suggests that the Labor Board should not be influenced by the ex-

aminer's [ALJ's] opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's report [ALJ's Decision] such probative force as it intrinsically commands." This Court held that the Courts of Appeals must "recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner [ALJ] who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusions." Id. at 496. As this Court reiterated in N.L.R.B. v. Walton Manufacturing Company, 369 U.S. 404, 408 (1962), it is the ALJ in a Labor Board case who "sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records."

By their failure to comply with the strictures of this Court to accord genuine consideration to the ALJ's credibility and other findings, and in general by the cursory and conclusory character of their affirmance of the Board Decision and

the lack of genuine judicial review of the record, the Judgment and majority Opinion below are in direct conflict with Universal Camera Corporation v. Labor Board, supra, and related cases. As this Court declared, "[r]eviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a court of appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." Id. at 490 (emphasis added).

In this case, both touchstones demonstrate the lack of justification for the Board's Decision, and thus for the Judgment and Opinion below. The Decision below contradicts the principles promulgated by this Court. This Court should address the important issues thus raised.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review this Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1505

UNITED TELEGRAPH WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

WESTERN UNION TELEGRAPH COMPANY

WESTERN UNION CORPORATION, ET AL., INTERVENORS

Petition for Review of an Order of the
National Labor Relations Board

Decided and Filed February 24, 1978

Isaac N. Groner, with whom Neal M. Sher was on the brief, for petitioner.

Richard B. Bader, Attorney, National Labor Relations Board, with whom John S. Irving, General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel and Robert G. Sewell, Attorney, National Labor Relations Board, were on the brief, for respondent.

Thomas M. Healy was on the brief, for intervenor, The Western Union Telegraph Company.

Thomas L. Morrissey was on the brief for intervenors, Western Union Corporation, et al.

Before: BAZELON, Chief Judge, TAMM and WILKEY, Circuit Judges

Opinion for the Court filed by Circuit Judge WILKEY.
Dissenting opinion filed by Chief Judge BAZELON.

WILKEY, Circuit Judge: This case presents the question of the collective bargaining obligations of a group of interrelated corporations. The United Telegraph Workers (the Union) long have been the collective bargaining representative of employees of Western Union Telegraph Co. (Telegraph). During 1969-73, Telegraph reorganized itself into a parent holding company and five subsidiaries. Telegraph, the common carrier, became the major subsidiary; its various non-FCC-regulated operations were spun off into four other subsidiaries. Following this corporate reorganization, the Union demanded that it be recognized as the collective bargaining representative, not only of the employees of Telegraph, but also of the employees of the parent and four other subsidiary corporations. These corporations refused to recognize the Union. The Union filed an unfair labor practice charge with the National Labor Relations Board, asserting that the six corporations constituted a "single employer" for purposes of collective bargaining, and that these corporations (excepting Telegraph) had unlawfully refused to recognize and bargain with it, in viola-

tion of § 8(a)(1) and (5) of the National Labor Relations Act.[1] Reversing the Administrative Law Judge (ALJ), a divided panel of the Board found that each corporation was a "separate and independent entity," and that the six corporations therefore did not constitute a "single employer"; accordingly, it held that Telegraph's bargaining obligations "had no application" to the parent or four other subsidiaries, and dismissed the complaint.[2] The Board's findings were amply supported by substantial evidence in the record, and we affirm on the basis of its opinion. We write briefly to address the suggestions aired by our dissenting colleague.

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[1] 29 U.S.C. § 158 (1970):

> (a) It shall be an unfair labor practice for an employer --
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights [to organize and bargain collectively] guaranteed in [§ 7 of the NLRA];
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [§ 9(a) of the NLRA].

[2] The ALJ's decision is reported at 224 N.L.R.B. 279 (1976). The Board's decision is reported in id. at 274, 92 L.R.R.M. 1443 (1976).

As in other areas of the law, corporations normally are treated as separate entities under the Labor Act. The Board treats multiple corporations as a single employer only when it is established that the normally separate corporations are in fact operated as a single integrated business enterprise. As explained approvingly by the Supreme Court in 1965, the Board weighs four factors in ascertaining whether several businesses are sufficiently integrated to be treated as one: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control.[3] After careful consideration of the facts, the Board concluded that of these "four key elements . . . only common ownership is present here."[4] Because common ownership is necessarily a feature of any conglomerate organization, and because common ownership is not determinative where common

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[3] Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv., 380 U.S. 255, 256 (1965) (per curiam), quoted with approval in South Prairie Constr. Co. v. Local 627, IUOE, 425 U.S. 800, 802 & n.3 (1976).

[4] 224 N.L.R.B. at 276, 92 L.R.R.M. at 1446.

control is not shown,[5] the Board held that the Union failed to demonstrate that the six corporations were a single employer.

Our dissenting colleague concedes that the record contains substantial evidence to support the Board's findings that these six corporations were not a single employer.[6] He denies, however, that disposition of this case can rest solely on consideration of the elements comprising the "single-employer" test, and would remand to let the Board consider whether the "alter-ego" and "successorship" doctrines are relevant to the circumstances of this case. We disagree.

First, we think that the "single-employer" test adequately disposes of this litigation. In Local 627, IUOE v. NLRB,[7] this Court

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[5] E.g., AFTRA v. NLRB, 462 F.2d 887, 892 (D.C. Cir. 1972); NLRB v. Welcome-American Fertilizer Co., 443 F.2d 19, 20-21 (9th Cir. 1971). See Local 627, IUOE v. NLRB, 518 F.2d 1040, 1044-47 (D.C. Cir. 1975), aff'd in relevant part and remanded on other grounds sub nom. South Prairie Constr. Co. v. Local 627, IUOE, 425 U.S. 800 (1976).

[6] Dissenting op. at 5-6 & n.11.

[7] 518 F.2d 1040, 1045-47 (D.C. Cir. 1975), aff'd in relevant part and remanded on other

squarely held that the collective bargaining obligations of integrated parent/subsidiary corporations under NLRA § 8(a)(1) and (5) were to be determined by means of the four-factor "single-employer" test that the Board used here. From the outset the litigation has proceeded on this assumption; from the outset the parties have done no more than dispute as to how facts under the "single-employer" test should be found.[8] If there is any doubt that the

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grounds sub nom. South Prairie Constr. Co. v. Local 627, IUOE, 425 U.S. 800, 802-04 & n.3 (1976).

[8] In its charge, the Union alleged that the six "nominally separate corporations [were] under the Act a single integrated enterprise and/or a single employer." App. 7. The General Counsel, the Union, and the corporations alike rested their cases before the ALJ on the "single-employer" rationale. App. 115-17. The ALJ stated that the "primary issue is whether the holding company and the various new subsidiaries are, in substance, . . . merely segments or departments of [Telegraph], which continues to operate as a single integrated enterprise," App. 79, and made detailed findings on each of the four factors of the "single-employer" test. App. 117-25. Reversing the ALJ, the Board made different factual findings on each of these four factors, and concluded that the corporations did not "constitute a single employer." 224 N.L.R.B. at 274, 92 L.R.R.M. at 1444. Member Fanning agreed that the "single-employer" test disposed of the case, and dissented on factual grounds. Id. at 277-79, 92 L.R.R.M. at 1447-49. The parties, on brief and

"single-employer" test is adequate to dispose of this case, it has never been expressed by this Court, by any other court, by any of the parties to this litigation, or by any of the expert decisionmakers who have considered the case thus far.

Second, we think that remand for further consideration would serve no purpose. Remand for consideration of the "alter-ego" doctrine would be redundant, for in ascertaining under the "single-employer" test whether the various corporations have interrelated operations, common management, common ownership, and centralized control of labor relations, the Board plainly made factual findings akin to any it would make under an "alter-ego" rubric.[9] Remand for consideration of the "successorship" doctrine would be futile, and unjustifiable in any event. The General Counsel, representing the charging party

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oral argument to this Court, have agreed that the "single-employer" test disposes of the case, and merely rehearsed the factual dispute that divided the Board.

[9] Indeed, the ALJ made explicit findings on the "alter-ego" theory, App. 87, and his findings were implicitly rejected by the Board.

before the ALJ, stated that the successorship doctrine was inapplicable.[10] The charged parties agreed that "the doctrine of successorship 'would require radical transformation' to be applicable" here.[11] The ALJ concluded that this case "[did] not involve[e] . . . a successorship situation."[12] The successorship doctrine was not mentioned by the majority or dissenter on the Board, nor by any party on brief or on oral argument to this Court. There is simply no reason to remand this case to an expert agency for consideration of a theory which both it and all parties before it have at all times agreed is irrelevant.

Our role in this case is to affirm the Board's decision if its decision is supported by substantial evidence in the record. We all agree that the Board's decision is supported by substantial evidence in the reocrd and its decision accordingly is

Affirmed.

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[10] App. 115.

[11] App. 116.

[12] App. 127.

BAZELON, Chief Judge, dissenting: This case concerns the legal principles governing the bargaining obligations of an employer that "spins off" portions of its business to wholly-owned subsidiaries. Relying primarily on our recent decision in Local 627, International Union of Operating Engineers v. NLRB,[1] the court today upholds the Board's consideration of four criteria -- common ownership, common management, interrelationship of operations, and centralized control over labor relations. Although these are valid criteria, they do not include all the relevant considerations in cases involving reorganization through "spin offs." Local 627 concerned the bargaining obligations of two competing companies that had intermingled their operations but maintained separate work forces.[2] Here, by contrast, the union

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[1] 518 F.2d 1040 (D.C. Cir. 1975), aff'd in relevant part sub nom. South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers, 425 U.S. 800 (1976).

[2] Local 627 concerned two commonly-owned construction companies, South Prairie, located in Nebraska, and Kiewit Sons', located in Oklahoma. South Prairie was nonunionized, but employees of Kiewit Sons' were members of a union. The dispute

contends that the employer simply incorporated its existing divisions, and subsequently hired nonunion employees to replace members of the union. Previous Board and court decisions concerning similar problems reveal consideration of other factors, such as (a) whether the reorganization was motivated by an intention to avoid obligations to the union, and (b) whether, from the perspective of the employees, the employing enterprise has remained essentially the same. The Board in this case gave inadequate attention to union animus and none at all to the perspective of the employees. For these reasons I would remand to the Board for further consideration and, if needed, additional proceedings.

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arose after South Prairie commenced operations in Oklahoma and competed for available work there with Kiewit Sons'. The union challenged South Prairie's refusal to bargain with it on grounds that the two companies were centrally controlled and had so substantially intermingled their operations as to comprise a "single employer" in fact. This case would be identical if the union's claim were merely that Western Union had established new corporate subsidiaries to compete with existing divisions of the old company, and that these subsidiaries and divisions had substantially intermingled their operations. This is not, however, what the union alleges -- it maintains that Western Union simply gave corporate form to its existing divisions. Under these circumstances -- where the unionized operations allegedly cease to exist -- additional questions arise, as discussed below.

I

Our national labor policy has long embraced the principle that, to ensure fairness to employees, the duty of an employer to bargain with a union must sometimes be imposed on another, nominally separate business entity. Such an obligation has been found to exist by the NLRB and the courts in a variety of factual settings.

One such set of circumstances has led to what is referred to as the "alter ego" doctrine. As one commentator has described it, this doctrine applies where "a technical change in employer identity is merely incident to the former employer's attempt to disguise its continuance because of that employer's union animus or an unlawful motive to avoid the commands of national labor laws."[3] In such situations the "new" employer is deemed the alter ego of the former employer and is held responsible for the former employer's labor obligations, since the law views them as

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[3] Slicker, A Reconsideration of the Doctrine of Employer Successorship -- A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051, 1064 (1973) (hereinafter cited as "Slicker").

the same employer in fact.[4]

A second such set of circumstances has resulted in what is known as the doctrine of employer "successorship." The sale of an enterprise is perhaps the simplest situation in which successorship might apply.[5] The concept has been utilized, however, in a great number of circumstances, as described in the margin, including corporate reorganization.[6] In each instance the

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[4] See e.g., NLRB v. Southport Petroleum Co., 315 U.S. 100 (1942); NLRB v. Herman Brothers Pet Supply, Inc., 325 F.2d 68 (6th Cir. 1963); NLRB v. Ozark Hardwood Co., 282 F.2d 1 (8th Cir. 1960); NLRB v. Weirton Steel Co., 135 F.2d 494 (3d Cir. 1943); Associated Trans. Co., 194 N.L.R.B. No. 12 (1971).

[5] See, e.g., Chemrock Corp., 151 N.L.R.B. 1074 (1965); Stonewall Cotton Mills, 80 N.L.R.B. 325 (1948).

[6] Successorship principles were recently applied in the context of corporate reorganization in NLRB v. DIT-MCO, Inc., 428 F.2d 775, 780-781 (8th Cir. 1970). Other applications have included cases where a former partnership incorporated e.g., Dickey v. NLRB, 217 F.2d 652 (6th Cir. 1954); Northwest Glove Co., 74 N.L.R.B. 1697 (1947); where a former corporation dissolved into a partnership, e.g., NLRB v. Adel Clay Prod. Co., 134 F.2d 342 (8th Cir. 1943); where a former corporation merged with another, e.g., John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); NLRB v.

crucial inquiry is whether, after one employer transfers its assets to another, there nevertheless remains "substantial continuity" of identity in the business enterprise"[7] from the vantage of the employees.[8]

Tempest Shirt Mfg. Co., 285 F.2d 1 (5th Cir. 1960); where the business of the former corporation was leased, e.g., NLRB v. Armato, 199 F.2d 800 (7th Cir. 1952); NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945); and where a portion of the former employer's business was assumed, e.g., American Concrete Pipe, Inc., 128 N.L.R.B. 720 (1960); Firchau Logging Co., 126 N.L.R.B. 1215 (1960). For further examples, see Slicker, supra note 3, at 1062-63. Slicker observes that "[t]he form of the succession, that is, the means by which the new employer gains operational control of the enterprise, has been consistently held to be immaterial to the analysis." Id. at 1062. Accord, Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182-183, n.5 (1973); but cf. Howard Johnson Co. v. Hotel & Restaurant Employees & Bartenders Int'l. Union, 417 U.S. 249, 257 (1974).

[7] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1966) (quoted in Howard Johnson Co. v. Hotel & Restaurant Employees & Bartenders Int'l. Union, 417 U.S. 249, 259 (1974)). The Howard Johnson case speaks also in terms of "a substantial continuity in the identity of the work force." Id. at 263. See note 13 infra.

[8] E.g., NLRB v. DIT-MCO, Inc., 428 F.2d 775, 781 (8th Cir. 1970) ("That DIT-MCO Division initially provided the majority of all plant production and maintenance employees [to Brooks II] indi-

Yet another such set of circumstances has given rise to the "single employer" standard, which the Board applied here. The theory underlying this concept is that

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cates, at least from the viewpoint of the employees, that Brooks II is a successor employer within the purview of the Act."). See also Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967); NLRB v. Hurley Co., 310 F.2d 158 (8th Cir. 1962); NLRB v. J. W. Rex Co., 243 F.2d 356 (3d Cir. 1957); NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954); Witham Buick, Inc., 139 N.L.R.B. 1209 (1962); Alexander Milburn Co., 78 N.L.R.B. 747 (1947).

In John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1966), the Supreme Court held that an employer's contractual duty to arbitrate a labor dispute survived a corporate merger. The Court's language seems particularly instructive as to the importance of viewing the successorship issue -- regardless of the context in which it arises -- from the perspective of the employees:

> Employees, and the Union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

Id. at 549.

where several nominally separate businesses integrate their operations, thereby combining their resources and gaining leverage over their employees, they should be treated as a single employer for purposes of enforcing duties imposed by the National Labor Relations Act (the Act).[9] As mentioned above, the controlling criteria are common ownership, common management, interrelationship of operations, and centralized control over labor policies.[10]

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[9] 29 U.S.C. § 141 et seq.

[10] See, e.g., Radio Union v. Broadcast Services of Mobile, Inc., 380 U.S. 225 (1965); Sakrete of Northern California, Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), cert. denied, 379 U.S. 961 (1965).

The majority asserts that these cases, in addition to Local 627, supra, establish the applicability of the single employer inquiry here. In Radio Union, supra, however, the Supreme Court approved such an inquiry in the context of a picketing dispute. And in Sakrete, supra, the court of appeals examined the single employer criteria in the context of a dispute over whether a California corporation was obligated to bargain with the union representing employees of an Ohio corporation. The majority refers us to no case, prior to this one, in which single employer analysis was held a sufficient basis to deny the existence of a duty to bargain in the context of corporate reorganization through "spin offs."

II

In this case I agree with the court that substantial evidence supports the Board's conclusion that the elements of single employer status have not been established.[11] My quarrel with the majority results from

[11] This is not to say that the Board's conclusion is without difficulty. In Local 627, supra, we said that the critical question is whether each business entity actually exercises control over its policy formulation and operating decisions and there actually exists, as a matter of substance, the "arm's length relationship found among unintegrated companies." 518 F.2d at 1046. Such a determination requires a probing inquiry into the underlying "realities of commercial organization," Canton Carp's, Inc., 125 N.L.R.B. 483, 484 (1959); American Fed. of Television & Radio Artists v. NLRB, 462 F.2d 887 (D.C.Cir. 1972), rather than merely "a technical exercise in the intricacies of corporate structure . . . ." NLRB v. Local 810, Steel Metals, Alloys, and Hardware Fabricators, 460 F.2d 1, 6 (2d Cir. 1972). In concluding that the Western Union corporate family does not comprise a single employer, the Board relied, inter alia, on findings that the compositions of the various corporate rosters are not identical, J.A. at 133, and that Western Union's vice president for labor relations holds no office in any of the other companies. Id. at 141. Such evidence hardly demonstrates that, for example, the directors of the new companies "could inaugurate or establish a labor policy . . . that did not meet with the absolute approval of the board of directors" of Western Union. NLRB v. Royal Oak Tool & Machine Co., 320 F.2d 77, 81 (6th Cir. 1963); Local 627, supra, 518 F.2d at 1046 n.10.

its refusal to recognize that, in cases involving reorganization through "spin offs," the Board may have to undertake all three of the inquiries I have described.

My position is well illustrated by the circumstances presented here. Essentially, Western Union reorganized itself into a holding company and five wholly-owned subsidiaries. The newly-created companies then refused to bargain with the union. If the evidence before the Board demonstrated that the reorganization was simply a change in corporate form precipitated by union animus, the new companies would be obligated under the alter-ego doctrine to bargain with the union.[12] Alternatively, if the evidence demonstrated that, despite reorganization, Western Union employees would view the employing enterprise as having remained substantially the same, the new companies would be obligated as successors to bargain with the union.[13]

[12] See cases cited in note 4 supra.

[13] Recent Supreme Court decisions arguably suggest that this would be true only if the new subsidiaries chose to hire a majority of Western Union's relevant work force. See generally Howard Johnson Co. v. Hotel & Restaurant Employees & Bar-

Finally, even if the new companies were created in good faith to pursue business strategies somewhat different from those in which Western Union has traditionally been engaged, the entire corporate family might nevertheless have been deemed a single employer if the evidence had revealed substantially integrated operations and cen-

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tenders Int'l. Union, 417 U.S. 249 (1974); NLRB v. Burns Int'l. Security Serv., Inc., 406 U.S. 272 (1971). In those cases, however, the Court appears to have been concerned about the legitimate entrepreneurial interest of a third-party employer in choosing for nondiscriminatory reasons to rely on its own work force rather than hire its predecessor's employees. See Howard Johnson, supra, 417 U.S. at 259-265. Emphatically distinguishing the alter ego line of cases, id. at 259 n.5, the Court indicated it would be unfair to impose labor obligations on a third-party employer that did not choose to take advantage of continuity. Id. at 259-265. In this case, unlike Howard Johnson and Burns, all of the employers are members of the same corporate family; and, as discussed below, the motives underlying the refusal to hire union employees have been called into question. Moreover, as indicated below, the corporate family as a whole did in fact choose to reap the advantages of continuity -- it accomplished this through short-term contractual arrangements between Western Union and the new subsidiaries for the services of union employees. Under these circumstances, it is not clear to me that the subsidiaries' decision not to hire union employees should preclude application of successorship principles.

trally controlled policies.[14]

III

My concern here is not merely to suggest the possibility that these inquiries may be necessary in future cases involving corporate reorganization through "spin offs." Rather, the union's claims and the evidence presented to the Board by its General Counsel squarely raised the question whether the reorganization of Western Union was motivated by an intention to avoid labor obligations and accomplished anything more than a change in corporate form from the perspective of the employees.[15] Moreover,

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[14] The cases in which a duty to bargain was imposed on a nominally separate business entity under the single employer doctrine appear, however, to concern companies engaged in substantially similar lines of business. See, e.g., Local 627, supra; Sakrete of Northern California, Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), cert. denied, 379 U.S. 961 (1965). Where such companies integrate their operations and are controlled centrally, fairness requires that all of them bargain with the union, since the nonunion companies could otherwise be expected to draw away union employees' work. This was precisely the concern in Local 627, 518 F.2d at 1049, and would be the principal concern here as well if Western Union had established new, nonunion subsidiaries to compete with its unionized operations. See note 2 infra.

[15] The court makes much of the fact that this litigation has proceeded to date under the single

the Administrative Law Judge (ALJ) found that the evidence supported the union's position. The Board never articulated its reasons for rejecting some of the ALJ's findings and failing to address others. In reversing the decision of a trial examiner, the Board is required to address itself to his crucial findings and make clear its basis for rejecting them.[16]

The ALJ found that Western Union actively concealed from the union its plans

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employer rubric, and emphasizes that, in proceedings before the Administrative Law Judge (ALJ), the successorship doctrine was considered by all to be inapplicable. Maj. op. at 4. What the majority overlooks is that, irrespective of the union's choice of labels, the union has consistently taken the position that from its point of view the reorganization of Western Union amounted to nothing more than a change in corporate form, Brief for Petitioner at 4-6, inspired at least in part by an intention to avoid labor obligations. Id. at 23, 40-47. Moreover, as indicated below, much of the ALJ's opinion was devoted to discussion of the evidence supporting this position.

16 See e.g., Teamsters Local 769 v. NLRB, 532 F.2d 1385, 1392 (D.C.Cir. 1976); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 853 (D.C.Cir. 1970), cert. denied, 403 U.S. 923 (1971); F. W. Means & Co. v. NLRB, 377 F.2d 683, 687-688 (7th Cir. 1967); Local 4-243, Oil Wrkrs. v. NLRB, 362 F.2d 943, 946 (D.C.Cir. 1966).

to reorganize, J.A. at 112-113, and embraced a deliberate policy against transferring union employees to the new companies, id. at 109. The Board did not address, much less contradict, either of these findings. Also, the ALJ found that Western Union failed adequately to explain its asserted buisness justifications for reorganizing. Id. at 84-85.[17] Although the Board concluded otherwise, it did not disclose the reasons underlying its disagreement. Id. at 132-133.[18]

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17 Western Union claimed that because of certain FCC rulings and restrictions in its corporate charter, diversification of its businesses could be accomplished only through separately incorporated entities. The ALJ found, however, that the FCC rulings to which the company referred required separate incorporation only if the company sought to engage in data processing, J.A. at 5-7, and that the new subsidiary allegedly created to develop and market data-processing systems had not done so in fact but simply assumed Western Union's existing data-transmission systems design, engineering, and marketing operations. Id. at 100-101. Moreover, the ALJ found that the asserted restrictions in Western Union's corporate charter had not prevented the company from engaging before reorganization in unregulated business activities identical to those now performed by the new subsidiaries. Id. at 84-85, 87-88, 92-95, 100-101, 103-106.

18 Without addressing the ALJ's findings to the contrary, see note 17 supra, the Board merely

Moreover, the ALJ determined that, initially, the new subsidiaries were merely corporate shells, which became operational only by contracting with Western Union for the services of its union employees. J.A. at 89-91, 94, 96-97, 126. Many of these employees apparently continued for a time to perform the same jobs, in the same facilities, and under the same supervisors as before. Id.[19] Subsequently, the new subsidiaries terminated their arrangements with Western Union and hired nonunion employees to perform precisely the same

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offers the naked conclusion that Western Union's corporate charter and the FCC would permit diversification only through incorporation of separate legal entities, J.A. at 132-133, and that the new companies are engaged in unregulated businesses that "could not have [existed] and did not exist in Western Union" by reason of these restrictions. Id.

19 Such factors obviously have a crucial bearing on the determination whether the nature of the employment relationship remained substantially the same. See, e.g., Howard Johnson Co. v. Hotel & Restaurant Employees & Bartenders Int'l. Union, 417 U.S. 249, 258 (1974); NLRB v. Burns Int'l. Security Serv., Inc., 406 U.S. 272, 280 n.4 (1971); NLRB v. BANDAGE, Inc., 534 F.2d 1, 4 (1st Cir. 1976). For a more complete listing of the criteria the Board has considered in other cases, see Border Steel Rolling Mills, Inc., 204 N.L.R.B. 814 (1973).

tasks. Id. Western Union then laid off members of the union, whose services were no longer needed. Id. at 108-112. Yet the Board did not reveal whether it considered any of these circumstances -- or their bearing on the viewpoint of union employees -- in concluding that reorganization resulted in the creation of new businesses and had no adverse impact on Western Union's bargaining unit. Id. at 136-137.[20]

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20 The Board appears to have rested its conclusion that the new subsidiaries are engaged in genuinely "new" businesses solely on a finding that their operations are unregulated, while Western Union's prior operations were regulated by the Federal Communications Commission. J.A. at 132-133. The dissenting Board member found no evidence whatsoever to support the proposition that Western Union had not previously engaged in unregulated activities identical to those now performed by the new subsidiaries. Id. at 142-147. The ALJ described in detail Western Union's unregulated activities prior to reorganization. See generally Opinion of the ALJ, J.A. at 78-129. Even if there were substantial evidence that this regulated/unregulated distinction is valid, it would hardly affect the viewpoint of employees who, regardless of FCC regulation, continued immediately after reorganization to perform the same tasks, in the same facilities, and under the same supervisors.

IV

A reviewing court has responsibility to ensure that Board decision comports with applicable legal principles.[21] To discharge this responsibility I would remand the case for consideration of the foregoing matters and for further proceedings, if the Board were so advised.

[21] See, e.g., NLRB v. Brown, 380 U.S. 278, 291-292 (1965); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

APPENDIX B

MFJ

224 NLRB No. 25

D--1223
Mahwah, N.J.
New York, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 5--CA--6142

WESTERN UNION CORPORATION; TELEPROCESSING INDUSTRIES, INC.; WESTERN UNION DATA SERVICES COMPANY, INC.; WESTERN UNION REALTY CORPORATION; GIFTAMERICA, INC.; THE WESTERN UNION TELEGRAPH COMPANY

and

UNITED TELEGRAPH WORKERS, AFL-CIO

Decided June 1, 1976

DECISION AND ORDER

On January 10, 1975, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent The Western Union Telegraph Company filed exceptions and a supporting brief; Respondents Western Union Corporation, Teleprocessing Industries, Inc., Western Union Data Services Company, Inc., Western Union Realty Corporation, and GiftAmerica, Inc., filed joint exceptions and

a supporting brief; the Union and the General Counsel filed briefs in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that The Western Union Telegraph Company, herein called Western Union; Western Union Corporation, herein called WUC; Teleprocessing Industries, Inc., herein called TII; Western Union Data Services Company, Inc., herein called DSC; Western Union Realty Corporation, herein called WURC; and GiftAmerica, Inc., herein called GA, constitute a single employer for purposes of collective bargaining and that their employees are included in the certified

bargaining unit of Western Union's employees. He concluded, therefore, that by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees of the above-named corporations other than Western Union, the Respondents violated Section 8(a)(5) and (1) of the Act.

We do not agree that the Respondents constitute a single employer; rather, we find that each corporation is a separate and independent entity and that, therefore, Western Union's bargaining obligations have no application to WUC or WUC's other four subsidiaries.

Western Union, the oldest of the Respondents, has traditionally been engaged exclusively in the business of providing record communication services pursuant to tariff and subject to regulation of the Federal Communications Commission (FCC) and state agencies. In recent years it has embarked on a massive modernization program and has sought to expand an diversify its activities. The New York Transportation Corporations Law, which governs

the terms of Western Union's charter, restricts a telegraph corporation's business to telegraph communications. The FCC has also determined that if a regulated carrier such as Western Union became involved in unregulated business it would be required separately to incorporate such unregulated business. As a result of state and FCC limitations on Western Union's expansion into unregulated businesses, WUC, a holding company, and four new subsidiaries, DSC, TII, WURC, and GA were created, without, however, affecting Western Union's business and without any adverse effect upon Western Union's bargaining unit.

DSC was created to engage in the unregulated business of leasing terminal equipment for use with computers. TII was created to engage in the unregulated business of selling information and data processing systems and services. GA was created to engage in the unregulated business of selling and delivering gift merchandise through franchised dealers, using both over-the-counter sales and a nationally advertised telephone order system (GA ceased operations in August 1974); WURC

was created to permit development of a professional real estate business selling its services to customers other than Western Union and buying and selling land for investment purposes.

The record establishes that, while there is some overlap of corporate officers between the holding company and of its subsidiaries, excepting Western Union, the rosters of corporate officers of the various corporations are not identical. Indeed, each of the six corporations has its own president, who does not hold that office, or (other than the president of the now defunct GA) <u>any</u> office or directorship in <u>any</u> of the corporations other than that over which he presides. For example, with the exception of its chairman of the board, none of DSC's corporate officers holds an office in the other corporations, and six of WURC's nine corporate officers hold no office in the other corporations. Similarly, four of TII's seven directors are not officers or directors of either WUC or the other subsidiaries.

Moreover, although six of WUC's ten

directors, including the chairman of the Board, serve as directors of Western Union (with three other Western Union directors), none of Western Union's 18 officers, including the president and vice presidents with their designated responsibilities, serves in any office or directorship in either WUC or the new subsidiaries. Most importantly, Western Union's vice president in charge of employee relations holds no office or directorship in either WUC or the other four subsidiaries.

Thus, the few examples of common officers or directors among WUC and the various subsidiaries cited by our dissenting colleague are outweighed by the distinct separateness of Western Union's officers. Certainly there is no basis for our dissenting colleague's assumption that Western Union's labor relations are controlled by, or control, the labor relations of either WUC or the other subsidiaries. To adopt the approach of our dissenting colleague would result in an automatic finding in every case that a wholly owned subsidiary or the constituent companies of a conglomerate are a single employer, since

it can equally be said in every case that "the fact that those policies [i.e., control of all aspects of the operations] are carried out by officers who in some cases do not hold similar offices in other corporations does not mean that those officers can or do operate independently of the control . . . of the directors and board chairman of [the parent corporation], the owner of the whole enterprise." But this is contrary to long-established principles followed by this Board. See, e.g., Royal Typewriter Company, a Division of Litton Business Systems, Inc., 209 NLRB 1006 (1974), enfd. 92 LRRM 2013, 78 LC ¶11,369 (C.A. 8, 1976).

The five new companies provide some services and facilities to Western Union, and vice versa, under contractual arrangements on a reimbursed basis. In this regard, DSC, with headquarters in Mahwah, New Jersey, began its operations with a group of professional and management personnel and minimum support staff of non-bargaining unit personnel from Western Union and initially subcontracted a large amount of its installation and mainte-

nance work to Western Union. As DSC's capabilities increased, DSC reduced its subcontracting, and now subcontracts only about 10 percent of such work to Western Union and other outside contractors. Similarly, Western Union at one time leased certain terminals and equipment (not part of DSC's product line) from DSC for 6 months, at which time Western Union purchased the equipment pursuant to its contract option.

TII initially rented office space from Western Union in Mahwah, New Jersey, pursuant to a written lease and contracted with Western Union for the support service of 18 individuals at the bargaining unit level. This arrangement terminated, and TII hired its own support employees when Western Union relocated its offices to Upper Saddle River, New Jersey. At the formation of TII, certain of Western Union's professional employees began work as employees of TII, and, pursuant to a contract with Western Union, TII provided Western Union with services, including planning and engineering, programming, and management of initial operations until the

systems developed for Western Union were fully functional when management responsibility was assumed by Western Union. Pursuant to Western Union's contract with TII, Western Union's bargaining unit employees operated and maintained these systems, consistent with industry practice of maintaining continuity of trained personnel when complicated engineering systems are involved. Upon Western Union's assuming management of these systems, TII no longer needed some of the management professionals, who then returned to work for Western Union to run the systems for which they had been trained.

GiftAmerica, which contracted with other contractors for services such as market research, computer, and warehouse, contracted with Western Union to provide a telephone answering service which was paid for on a per-call basis.

All services and facilities furnished Western Union by WURC, whose offices are located in New York City, are also provided pursuant to written leasing agreements on a fully reimbursed basis. Unlike our

dissenting colleague, we do not find significant the requirement that WURC obtain approval from its client, Western Union, before completing any transactions involving that client's operations. Indeed, a contrary arrangement would cast doubt on the separateness of the two corporations.

The Union and the General Counsel argue that Western Union has merely fragmented itself into separate corporations created from its own previously existing departments and thereby fragmented the established bargaining unit.[1] They contend that, as the Administrative Law Judge found, Western Union and the five new companies are, despite this fragmentation, a single integrated enterprise constituting a single employer for the purposes of collective bargaining.

However, contrary to the assertions of the Union and the findings of the Administrative Law Judge, the creation of the holding company and the four new subsidi-

[1] Both the General Counsel and the Union specifically disavow any contention that accretion to the established bargaining unit is in issue; rather, they argue that the Respondents are a single employer and have fragmented the unit.

aries has not fragmented Western Union's business or had an adverse impact on Western Union's bargaining unit. While each of these new corporations has some nexus with Western Union, their businesses, which are unregulated, had not existed as part of Western Union and had, therefore, not been performed by Western Union's bargaining unit employees; the traditional bargaining unit has remained intact within Western Union. Indeed, the functions of the other subsidiaries could not have been performed by Western Union, since it was limited by its New York charter and FCC regulations to providing record communication services pursuant to tariff and subject to regulation by the FCC.

The Administrative Law Judge's finding that Western Union did engage in untariffed activities is misleading. The various "untariffed services" to which he and our dissenting colleague refer were only incidental to tariffed communications or services. For example, as noted by the Administrative Law Judge, flowers by Western Union involved the placing of tariffed orders with florists who delivered the

flowers; Cigargram involved delivery of cigars with the tariffed telegrams; and Dollygram involved delivery of a doll with a tariffed telegram. Indeed, in the Candygram service, the only survivor of these services, the candy delivered with the tariffed telegrams is furnished by an outside company. In each instance, the cost to send the message, the central part of the service, is subject to prior regulatory approval, and in no instances are the "untariffed" portions of the services provided independently of the tariffed services. Similarly, contract maintenance of terminal equipment is incidental to leasing of Western Union's terminals for which the charge is tariffed.

Thus, any reliance by our dissenting colleague on the Administrative Law Judge's finding that Western Union had engaged in unregulated activity is misplaced. Clearly, as set forth above, Western Union was restricted in its operations and did not engage in untariffed services independent of its tariffed operations. Accordingly, the functions of the other subsidiaries, providing untariffed services unconnected

with any tariffed service, could not have and did not exist in Western Union.

It is well settled that a critical factor in determining whether separate legal entitles operate as a single employing enterprise is the common control of labor relations policies[2] and that common ownership is not determinative where such requisite common control is not shown.[3] Moreover, as noted above, such common control must be actual or active, as distinguished from potential control,[4] a

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[2] N.L.R.B. v. Condenser Corporation of America, 128 F.2d 67, 71 (C.A. 3, 1942); Gerace Construction, Inc. and Helger Construction Company, Inc., 193 NLRB 645 (1971); AAA Electric, Inc. and Simms Electric Co., 190 NLRB (1971); J. Howard Jenks, d/b/a/ Glendora Plumbing, 165 NLRB 101 (1967); L & S Construction Company, Inc., 155 NLRB 524 (1965).

[3] Gerace Construction, Inc., supra; Joe Robertson & Son, Inc., and N. J. Drywall Company, Inc., 174 NLRB 1073 (1969); Bel-Air Door; Alhambra Metal Products, Inc., Tyre Mfg. Co., Inc., 150 NLRB 481 (1964).

[4] Gerace Construction, Inc., supra; Miami Newspaper Pressmen's Local No. 46 [Knight Newspapers, Inc.] v. N.L.R.B., 322 F.2d 405 (C.A.D.C., 1963); Los Angeles Newspaper Guild, Local 69, et al. (Hearst Corporation), 185 NLRB 303 (1970), enfd. 443 F.2d 1173 (C.A. 9, 1971); Royal Typewriter Company, supra.

distinction ignored by our dissenting colleague. No such common control of labor relations is present herein. Indeed, of the four key elements essential to a finding of a "single integrated enterprise" -- common ownership and financial control, common management, interrelation of operations, and centralized control of labor relations[5] -- only common ownership is present here.

Noting that two top officials of WUC are the chairmen of the boards of the four new subsidiaries and that these new subsidiaries' respective boards of directors are elected by WUC directors, the Administrative Law Judge concluded that WUC exercises management control over those four subsidiaries. However, the record establishes that each subsidiary has its own board of directors which runs its own meetings and each has its own roster of corporate officers. Further, it is also apparent that day-to-day management responsibilities and decisions are handled at a level

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[5] Sakrete of Northern California, Inc., 140 NLRB 765 (1963), enfd. 332 F.2d 902 (C.A. 9, 1964), cert. denied 379 U.S. 961 (1965).

far below the two WUC officials serving as the subsidiaries' board chairmen.

In Frank N. Smith Associates, Inc.,[6] wherein the same four persons held identical offices in each of the involved corporations, which were engaged in the same general line of business, the Board found that each such corporation was a separate and independent entity. Thus, the fact that each of these corporations has its own president and vice presidents with designated responsibilities, would preclude a finding of common management based on the existence of several common directors.

Our Gerace[7] and Smith decisions establish that there is no interrelation of operations here. In Gerace, some employees of the new company had previously worked for the old company, and the new company used tools, equipment, and even a trailer office belonging to the old company. Also in Smith, employees of each company participated on occasion in pro-

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[6] 194 NLRB 212 (1971).

[7] Gerace Construction, Inc. and Helger Construction Company, Inc., supra.

jects of the other, and the new company used the office, office equipment, and office force of the old company. In each of those decisions, the Board did not find integration of the companies and noted the payment for use of such services and facilities.

Similarly, Western Union has provided facilities and services to the other subsidiaries, and vice versa, under written agreements on a fully reimbursed basis. Moreover, the record herein does not establish commonality as to additional factors discussed by the Board in considering interrelatedness. Among the indicia of interrelatedness not shown to be present herein are combined accounting records, bank accounts, lines of credit, payroll preparation, switchboards, telephone numbers, or offices. In such circumstances, we do not find that the mutually convenient arrangements existing between Western Union and the various other Respondents detract from their corporate independence.

Nor do we discern record evidence to support a finding of central control of

labor relations policies of Western Union and the other Respondents -- the critical factor in determining whether the Respondents constitute a single employer for the purposes of collective bargaining. Indeed, Western Union's fringe benefit plans are vastly different from those adopted by the other subsidiaries. Additionally, Western Union charges the other companies for use of its claims administration for certain insurance and disability benefits. Moreover, while finding WUC's common control of labor relations of the four new subsidiaries through WUC's control over their budgets and selection of their officers and directors, the Administrative Law Judge was unable to provide any basis for his conclusion that Western Union exercise any control over the labor relations and personnel policies of the other subsidiaries. We see no support in the record for such conclusion.

Further, the separateness of Western Union's labor relations from those of the other subsidiaries is established by the fact that Western Union has its own vice president in charge of its labor relations

and that he holds no office or directorship in any of the other corporations. Inasmuch as the record fails to reveal that Western Union's officer in charge of its labor relations is in any way involved with the labor relations policies of the other subsidiaries, we find that the requisite common control of labor relations by Western Union has not been shown.

We find, therefore, that inasmuch as the record herein does not support a finding that Western Union and the other Respondents operate as a single employing enterprise, Western Union's bargaining obligations have no application to the other Respondents.[8]

Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders

[8] Frank N. Smith Associates, Inc., supra; Gerace Construction, Inc., supra; Peter Kiewit Sons' Co. and South Prairie Construction Co., 206 NLRB 562 (1973), enforcement denied 518 F.2d 1040 (C.A.D.C., 1975).

that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

MEMBER FANNING, dissenting:

For the reasons stated by the Administrative Law Judge, I would adopt his recommended findings, conclusions, and Order. The Administration Law Judge has set forth in great and supporting detail the basis for his ultimate findings of fact that Respondent corporations, each and every one of them, formed from the financial and personnel resources of the Western Union Telegraph Company for the purpose of performing a function or functions formerly performed by that corporation constitute a single employer. The fact that in some cases the functions have expanded in scope after Western Union's reorganization and modernization program cannot alter that

basic fact. Indeed, it was for the express purpose of permitting Western Union to expand these activities, some of which under rulings of the Federal Communications Commission it was required to perform through separate subsidiary corporations, that Western Union changed its form of organization from a single independent corporation to a multicorporation form of organization. But, in so doing, it did not sell any of its assets; it did not change the ownership of its assets; it did not bring in new capital from sources outside of Western Union itself.

Throughout, control of the operations has remained in the hands of the people who controlled Western Union prior to the reorganization. Thus, when Western Union, the telegraph company, established Western Union Corporation which assumed ownership of all of Western Union's stock, all of Western Union's directors and its chairman, though retaining those positions with Western Union, assumed the same positions with WUC. Acting through those individuals in their WUC capacities, Western Union then proceeded to spin off several of its

departments to form Western Union Realty Corporation (WURC); Western Union Data Services Company, Inc. (DSC); Teleprocessing Industries, Inc. (TII); and GiftAmerica, Inc. (GA). In every case, the corporations were established as wholly owned subsidiaries of WUC. In every case, the executive and management, as well as non-bargaining unit support, personnel were transferred from Western Union to the new corporations. In every case, the new corporations depended on Western Union bargaining unit production, maintenance, clerical, and technical employees to perform the production and service work necessary to the successful functioning of the new corporations. Although most, if not all, such work was performed pursuant to agreements with Western Union, such agreements were executed in many instances long after work had commenced. DSC, for instance was incorporated in June 1970. Lacking "capabilities" for operating a separate business, it entered into six different agreements with Western Union. Five of them were dated July 1, 1970, and the other was dated January 1, 1971. All of them were executed by Western Union be-

tween February 23, 1971, and September 15, 1971. Further DSC's own corporate records -- minutes of a board of directors meeting of Novmeber 11, 1970 -- indicate that even the executive, management, and nonbargaining unit support people were on Western Union's payroll until January 1, 1971. Given these circumstances, it takes a leap of faith to find that DSC operated as an entity separate and apart from Western Union.

GiftAmerica furnishes another vivid example of the interrelationship of Western Union and its offspring. Prior to its formation, Western Union, itself, had long engage in furnishing to customers who purchased telegrams a variety of gift services. Flowers by Wire, Perfume by Wire, Candygram, and Dollygram to name a few. GiftAmerica was formed for the purpose of providing such gift services without the necessity of the customer purchasing a telegram, this to be done by the use of Western Union personnel and computer facilities. Prior to GiftAmerica's formation, the decision was made to utilize Western Union personnel and computer fa-

cilities as well as services of TII. Western Union personnel were trained in the necessary techniques and instructed to identify themselves when speaking to customers as "Gift America" and if asked for further clarification to respond that "Gift America is a subsidiary of Western Union which has been in the gift business with Candy Gram, Dolly Gram and flowers by air for many years." Thus when GiftAmerica became operational, Western Union employees rotated between transacting GiftAmerica's business and the business of Western Union.

Moreover, WURC is the incorporation of Western Union's real estate department. It performs the same functions now as it did as a department of Western Union and does so under strict control of Western Union and WUC. It must obtain prior approval of Western Union for any transaction involving that corporation's operations. WURC must get approval of WUC for all sales or purchases of real estate valued over $10,000. About the only additional function it has is the management of some Colorado real estate acquired apparently for speculative purposes.

Similarly, TII is the incorporation of Western Union's planning and engineering operations division. After incorporation it continued to design, develop, and implement the introduction of new computer hardware and other data processing equipment for Western Union with as much as 90 percent of its business being done for Western Union. Many of the people involved in such operations moved from Western Union to TII and back again to Western Union.

DSC upon its incorporation was assigned different parts of Western Union's business of leasing terminals. Although it has expanded that business, it has frequently complained to WUC that Western Union remains in that business and is competing with it.

The foregoing and the findings of the Administrative Law Judge demonstrate the interrelationship of the activities of the Respondent corporations. They demonstrate further, and contrary to my colleagues findings, that Western Union was not engaged solely in regulated activities prior to the reorganization. First there is the commonsense approach to this issue. They

find that the subsidiaries are all engaged in unregulated business. If that is so, it follows that Western Union was engaged in the same unregulated activities it severed from its business and created the corporations to perform. Second, the Administrative Law Judge has found that Western Union did engage in untariffed activities, such as the various gift by wire services and the leasing and contract maintenance of terminals unconnected to Western Union facilities. My colleagues cite no record evidence to demonstrate his error in this respect.

My colleagues concede, as they must, that all these activities are carried out under common ownership. They find that the element of common control, generally, and particularly with respect to labor relations is lacking. This finding rests on a profound misconception of the operative facts. The reorganization of Western Union occurred because of management decisions of Western Union's officers and directors. It was they who decided to embark on the program and to establish WUC as a holding company of Western Union's

stock with the mission of taking over the latter's executive and management functions with respect to the modernization program. These officials became the officials of WUC. The directors of Western Union became the directors of WUC. R. H. McFall, board chairman and president of Western Union, and its dominant management personality, assumed the same positions with WUC. Thus the situation remained until McFall decided to give up the presidency of Western Union and give it to the vice president of WUC. All six of Western Union's present directors are directors of WUC, which has 10. McFall is also board chairman of DSC and TII and is a director of WURC and GiftAmerica. C. O. Johnson, WUC's vice president of finance, is chairman of WURC and GiftAmerica. All of the directors of the subsidiaries are persons who have long worked for Western Union and McFall, and most of whom are directors of more than one of the corporations, including in many cases WUC or Western Union.

These are the men who establish and control the policies of the Respondent corporations. The fact that those policies are

carried out by officers who in some cases do not hold similar offices in other corporations does not mean that those officers can or do operate independently of the control, first of the directors of the corporations and secondly of the directors and board chairman of WUC, the owner of the whole enterprise.

Moreover, my colleagues finding that there is no common control of labor relations ignores the Administrative Law Judge's finding that, upon the establishment of the subsidiaries, Western Union and WUC made the decision that no bargaining unit employees would be transferred to the subsidiaries, but that such work would be done under contract with Western Union. It ignores his finding that, with respect to nonbargaining unit people transferred, hiring and compensation of all employees must be in accordance with a previously approved business plan. It ignores as well his finding that fringe benefit plans for the transferred employees were not adopted by the subsidiary corporations but by WUC. Finally, their reliance on the fact that Western Union's vice president

for labor relations is not an officer or director of any other corporation necessarily assumes that he is autonomous even in his own sphere. But, surely, he like any other management official must follow the policies of the corporate officers. I do not read the complaint as alleging that Western Union's vice president for labor relations controls the labor relations policies of the other corporations. Rather, I understand the issue to be whether all the corporations before us are controlled by a central management group. I believe that has been firmly established.

Nor do I believe the Gerace and Frank N. Smith Associates decisions cited by my colleagues can bear the weight placed upon them. Whatever validity they may have for union contractors who wish to operate "double-breasted" shops, part union and part nonunion, they simply did not involve fact patterns remotely similar to the one before us. In Gerace, the record showed that Gerace, the principal stockholder in one corporation, had sold his interest in the second corporation and that actual control of the second corporation resided in

its principal management official. In Smith Associates, the record showed that Smith Associates did not own the second corporation and that the second corporation was not part of Smith Associates either as a wholly or partially owned subsidiary. Here we have a mammoth nationwide corporation which decided to establish separate corporations out of its internal resources and personnel for the purpose of expanding certain of its activities, and which did so through means which retained ownership and control over all activities previously engaged in by the corporation in the same hands.

For all the foregoing reasons, I dissent from my colleagues' refusal to adopt the Administrative Law Judge's findings and conclusions with respect to the single employer issue.

Further, I would adopt his findings that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive representative of employees of all the corporations performing work of the

kind performed by employees in the Western Union bargaining unit. It is true that, initially, the reorganization did not have a severe impact on bargaining unit work because the subsidiaries commonly contracted with Western Union to do the work. But as time went by the subsidiaries began to hire employees off the street with the result that much of the work formerly contracted out is now being done by employees not included in the bargaining unit. Concomitantly with this there has been a reduction in Western Union's employee complement. Inasmuch as the six Respondent corporations are now doing essentially what Western Union alone did before the reorganization, it seems reasonably clear that the bargaining unit has been fragmented through Respondent's refusal to transfer bargaining unit employees to the subsidiaries or to even offer such employees work when and if they were laid off by Western Union.

Dated, Washington, D.C.

John H. Fanning, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX C

JD-823-74
Mahwah and Upper Saddle River, NJ, and New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case 5--CA--6142

WESTERN UNION CORPORATION; TELEPROCESSING INDUSTRIES, INC.; WESTERN UNION DATA SERVICES COMPANY, INC.; WESTERN UNION REALTY CORPORATION; GIFTAMERICA, INC.; THE WESTERN UNION TELEGRAPH COMPANY

and

UNITED TELEGRAPH WORKERS AFL-CIO

Decided January 10, 1975

Thomas P. Kennedy, Esq., for the General Counsel.

Thomas L. Morrissey, Esq. (Carpenter, Bennett & Morrissey), of Newark, NJ, for Respondents WUC, TII, DSC, WURC, and GA; and Thomas M. Healy, Esq., of Upper Saddle River, NJ, for Respondent Western Union.

Isaac N. Groner, Esq. (Cole and Groner), of Washington, DC, for the Charging Party.

DECISION

Statement of the Case

MARION C. LADWIG, Administrative Law Judge: This case was tried at Newark, New Jersey, on March 18, 20-21, 28-29, and April 1-4 and 22, 1974. The charge was filed by the Union on June 1, 1973 (amended January 21, 1974), and the complaint was issued on March 5, 1974.

The Union has, for many years, represented Western Union's employees in a virtually nationwide, certified bargaining unit. In recent years, Western Union has engaged in a massive modernization program, updating and computerizing its facilities and providing many new services -- with the "long-term goal of creating a single integrated electronic data communications (EDC) system for the nation." Despite the addition of these new services, which include both FCC-regulated and nonregulated activity, there has been a marked decline in the number of bargaining-unit employees.

During the progress of the modernization program, Western Union began, through cor-

porate restructuring, to divide up its business -- transferring some of the expanding nonregulated activity to new nonunion companies -- while retaining its goal of an integrated EDC system. This was accomplished by first incorporating a new holding company (WUC), which was formed with Western Union's same officers and directors, and with assets consisting solely of Western Union's stock. Western Union then became a subsidiary of WUC, which started incorporating a series of wholly-owned subsidiaries (the ones to date being WURC, DSC, TII, and GA, further identified below) to provide parts of Western Union's nonregulated services. These new companies were staffed primarily by Western Union's non-bargaining-unit (nonunion) managerial, professional, and confidential employees -- without the supporting union employees, whose services Western Union provided to the new companies through a variety of contracting arrangements. In this way, WUC and its four new subsidiaries were able to operate nonunion, while utilizing the contracted services of union employees,

many of whom were gradually replaced with nonunion employees.

The primary issue is whether the holding company and the various new subsidiaries are, in substance -- apart from the corporate veils -- merely segments or departments of Western Union, which continues to operate as a single integrated enterprise, with a Section 8(a)(5) obligation to bargain with the Union for the overall bargaining unit, or whether the bargaining unit is to be confined to employees now on Western Union's direct payroll.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Union, and the brief filed by all the Respondents (except Western Union, which adopted the other Respondents' brief), I

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[1] The stipulation for correction of the transcript, dated May 14, 1974, and the Union's unopposed July 11 request to correct and supplement the stipulation, are accepted, granted, and received in evidence as G.C. Exh. 265, and the corrections are hereby made in the transcript.

make the following:

Findings of Fact

I. Jurisdiction

Western Union, a New York corporation, and WURC (Western Union Realty Corporation), DSC (Western Union Data Services Company, Inc.), TII (Teleprocessing Industries, Inc.), and GA (GiftAmerica, Inc.), each a Delaware corporation and a wholly-owned subsidiary of WUC (Western Union Corporation), have their principal places of business in New Jersey (except for WURC in New York) and each annually receives in excess of $50,000 from sales and services to customers located outside those States. WUC, a Delaware corporation, operates as a holding company in New Jersey, where it annually receives in excess of $50,000 for services to firms which make sales and services in excess of $50,000 outside that State. The six Respondents each admits, and I find (apart from whether they together constitute a single employer for collective-bargaining purposes), that each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act, and

that the Union (United Telegraph Workers, AFL-CIO) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Bargaining Unit

Western Union (The Western Union Telegraph Company, also referred to in the record as WU, WUTCO, and Telegraph Company) is a large, nationwide (48-state) communications company with assets of over one and a fourth billion dollars, and annual revenues approaching one-half billion dollars. In 1945, the Board certified the Union's predecessor as the exclusive collective-bargaining representative of Western Union's production, operations, maintenance, technical, and clerical employees in an overall, nationwide unit -- excepting only the Metropolitan Division, in the New York City area, in which another union was certified. The Board's decision in Case 17-R-742 directed elections in divisional units, described by department, classification, and in some instances further by employee names, on 64 pages of the printed volume, Western

Union Telegraph Company, 58 NLRB 1283, 1289, 1297--6A through 1297--68A (1944). The Board's certification was amended in 61 NLRB 110 (1945) to consolidate all the divisions -- except the Metropolitan -- into a single bargaining unit.

Since 1945, as Western Union has carried on its modernization program (and as the number of employees in the bargaining unit has declined by several thousands), Western Union and the Union have, by agreement, included in the bargaining unit a number of new classifications for jobs which did not exist at the time of the certification. Some examples are the Chief Autodin Microwave Maintainer (who "Directs the work of Autodin Microwave Maintainers at Autodin Centers. Performs the work he directs . . . must have held a title of Microwave Maintainer, Computer Center Technician, Autodin Microwave Maintainer or the supervisory title associated with these classifications . . ."); the Computer Center Technician (who "Maintains programmed electronic high speed switching systems and associated data processing equipment and facilities in accordance

with prescribed technical procedures. Maintains computer and associated apparatus. Tests, regulates and maintains radio beam, radio multiplexing, carrier, repeaters, electronic and associated telegraph equipment in accordance with prescribed technical procedures . . . ."); and the Computer Console Controller (who "Operates programmed electronic high speed data switching, digital computer systems, and associated data processing equipment and facilities in accordance with prescribed technical procedures . . . .")

B. Fragmentation of Western Union

1. Regulated and nonregulated activity

In 1958, Western Union completed "A Decade of Progress," during which its "research and development engineers have produced a constant succession of new and better ways to speed messages in writing." As reported in its 1958 annual report to its stockholders, "More than $35,000,000 was spent by your Company during these years in creating, perfecting and advancing facilities, methods and techniques for the rapid transmission of messages and

data by wire, radio beam and cable."

By 1962, Western Union's AUTODIN system became operational as a leased system for the Department of Defense. Designed and developed over several years by Western Union as the prime contractor, with RCA as the principal subcontractor, AUTODIN (automatic digital network) by 1963 was a "data and message transmission system, incorporating a nucleus of five automatic computer switching centers" (later expanded to nine such centers). By 1966, it was "the world's largest computer-controlled communications system."

In 1964, Western Union began applying "the latest techniques for handling and transmission of data by computers" -- as embodied in AUTODIN, as well as in Western Union's similar GSA system -- to design and install private systems "for a number of important business organizations." Citing "the advanced research and engineering work done by the Company's engineers" in the data field, Western Union's 1964 annual report stated as an example: "The heart of the 80-city, data-message network being

installed for Dun & Bradstreet is a fully automatic (Western Union Plan 301) switching center . . . and includes a computer."

The same 1964 annual report cited a number of new, non-FCC-regulated Western Union services, supplementing the FCC-regulated sending of telegrams. They were "Flowers by Western Union" (Western Union offices at the telegram-delivering cities placing orders with the local florists who deliver the flowers); Cigargram (Western Union offices stocking cigars for delivery with the telegram); Dollygram (permitting the telegram sender to select a doll for delivery with the telegram); and a Western Union telephone answering service.

Also, as stated in the 1964 annual report, "Western Union pioneered in the custom-design of leased communications systems to meet the specific requirements of individual business firms." (Emphasis supplied.) This service included, first, a study of the customer's requirements and development of a total information system; second, "engineering of an integrated 'hardware' (computer and associated equip-

ment) system," selecting and installing the computer and data processing equipment, "using existing equipment where possible, and designing equipment needed but not available commercially -- and developing the 'software' (programs and operating routines) required"; and third, "specifications and installation of the communications network and equipment for transmitting information to and from remote locations," and then servicing the new management information and communications system.

Between 1965 and 1969, Western Union greatly accelerated its modernization program, spending over $600 million. It assembled at the Western Union Technology Center in Mahwah, New Jersey, about 400 professionals "in the disciplines of systems design, programming, transmission engineering, and allied fields," and "built -- virtually from the ground up -- a technological capability successfully combining computer hardware, software and communications know-how." By late 1969, Phase I of Western Union's information

services computer system (ISCS) was operational, with a network of four computer centers, providing store-and-forward message switching and employing shared computer capacity to render a variety of services. One of these services was to interconnect Western Union's 30,000 Telex (teleprinter) subscribers with the approximately 40,000-teleprinter network of TWX, which Western Union was purchasing from AT&T. Western Union offered two shared-system computer services: SICOM, which interconnected brokerage firms with stock exchanges, and INFO-COM, a system designed to provide private record communication networks for general business operations. In addition to AUTODIN and other government-leased systems, Western Union provided Broadband Exchange (a fully automatic, alternate voice/data, cutstomer-to-customer, circuit-switched exhange service), and Hot/Line (a non-dial immediate-connection voice service between certain major cities). It continued to offer telegram and money order services, and also offered other (including a number of untariffed) services, including DollyGram,

CandyGram, MelodyGram, Perfume-by-Wire, Flowers-by-Wire, telephone answering service, facsimile service, messenger service, sale of express money orders and travelers cheques, sales of facsimile and teleprinter paper, OPERATOR 25 (dealer inquiry), etc. (as reported in its 1969 proxy statement). It also maintained a real estate department for handling its many facilities throughout the nation, and provided contract maintenance of terminal equipment (another untariffed activity).

2. FCC rulings

As Western Union's modernization program progressed, the FCC was making rulings affecting Western Union's plans for expanded services. The Carterfone decision, In the Matter of Use of Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968), suggested a business opportunity; and the Computer Inquiry, begun in 1966, suggested a limitation.

In Carterfone, which involved a device for connecting a telephone to a mobile radio system, the FCC ruled that AT&T could not lawfully, by tariff, prohibit the use

of such interconnecting devices which do not adversely affect the telephone system. This ruling suggested that Western Union would have the opportunity of competing with others for the newly nonregulated market of leasing and servicing the widely-used data communication terminals (and later, high-speed models) to private wire customers using telephone circuits.

In the so-called Computer Inquiry, the FCC issued a Notice of Inquiry (7 FCC 2d 11) in 1966, and a Supplemental Notice of Inquiry (7 FCC 2d 19) in 1967, initiating a general investigation into the interdependence of computer and communication services. On May 9, 1969, the FCC released a Report and Further Notice of Inquiry (17 FCC 2d 587), and on April 3, 1970, it issued a Tentative Decision (28 FCC 2d 291), followed on March 18, 1971, by its Final Decision and Order (28 FCC 2d 267), enforcement of which (after a denial of reconsideration) was granted in part in GTE Service Corporation v. F.C.C., 474 F.2d 724, 728 (2 Cir. 1973).

The FCC pointed out, as an introduction

to its discussion of "the problems posed by the provision of data processing services by common carriers" (paragraph 24 of its Tentative Decision), that it knew of no provision of law which prohibits or bars common carriers (such as Western Union) to provide nonregulated service "subject to certain safeguards" (citing, in footnote 3, a November 5, 1964 letter from the FCC Chairman to Congressman James Roosevelt regarding the Western Union "Flowers by Wire" service). It added, "To the contrary, our rules contemplate that other services may be furnished by such carriers and prescribe the methods of accounting for the reporting with respect to such services" (stating, in footnote 4, "For example, communications common carriers with separate departments or divisions [emphasis supplied] for the conduct of common carrier and non-common carrier activities must file with the Commission separate supplemental annual reports with respect to each of the activities, 47 C.F.R. 43-21(b).") In the 1964 letter, the FCC Chairman wrote:

> The Commission, after a careful examination of the flower service, has concluded that it is not a common carrier communication service and therefore, not subject to the Act. At the outset it should be emphasized that the Communications Act of 1934 does not prohibit a common carrier from engaging in noncommunication services. In this regard, Western Union has a long history of providing many various services which are not considered to be common carrier communications services under section 3(h) of the Act. Thus, the fact that Western Union holds itself out as a communications common carrier does not preclude it from performing other services in a noncarrier status.

Elsewhere in the letter, the FCC Chairman stated that "if it were found that such service was a burden upon [Western Union's] regulated services, it appears that the Commission could take appropriate steps to relieve the burden of its common carrier services." Concerning Western Union's "gift or shopping order service" being tariffed whereas the flower service was not, "Western Union's only explanation for these differences was that in 1916, it originally filed its shopping order service as a tariff and all subsequent revisions to the service have been filed as

tariff material. However, in the light of our determinations with respect to its flower order service, the Commission is requesting Western Union to withdraw its shopping order service as tariff material. Western Union has expressed a willingness to do this." (Inasmuch as this letter from the FCC was incorporated by reference in Respondents' exhibit, R.W. Exh. 24A, it is accepted into evidence as R.W. Exh. 24AA.) I reject, as unfounded, the contention in Respondents' brief that "the common element from one aspect" of Western Union's "business to another is that all services are governed by tariffs which are subject to the approval" of FCC, and I discredit Western Union General Counsel Richard Hostetler's testimony, at one point, that "All services of the Telegraph Company are tariffed."

The FCC made a different decision, however, concerning such common carriers as Western Union providing, to nonaffiliated customers, "data processing," defined as the storing, retrieving, sorting, merging, and calculating of data, according to pro-

grammed instructions. (Data processing is to be distinguished from "message-switching," which is essentially a "store and forward" function, and which is defined as computer-controlled transmission of message via communications facilities, wherein the content of the message remains unaltered. A "hybrid service" combines data processing and message switching. The FCC has ruled that Western Union's SICOM and INFOCOM are regulated hybrid services, in which the data processing is incidental to message switching, as distinguished from nonregulated hybrid services, in which the "message-switching is offered as an integral part of and as an incidental feature of a package offering that is primarily data processing," as stated in section F of the Tentative Decision.) The FCC held in substance, as recited in the GTE case, 474 F.2d at 729-730, that no such common carrier shall furnish unregulated data processing services to others except through a separate corporation entity which must maintain its own books of account, have separate officers, employ separate operating personnel, and utilize

separate computing equipment and facilities. Meanwhile, the New York Public Service Commission ruled that because of Western Union's limited corporate charter in New York, its stock could not be issued to acquire control of PR Newswire Association, Inc. (a company engaged in the news distribution service), which was not a regulated communications common carrier.

3. Decision to divide up the business

As indicated above, Western Union had a "long-term goal of creating a single integrated electronic data communications (EDC) system for the nation" (the words of Russell McFall, president and board chairman for both Western Union and WUC, in the Western Union 1969 annual report -- issued by WUC, which became operational on January 30, 1970). Leading toward this goal of "one nationwide system capable of accepting, handling, transmitting, processing and disseminating messages and data," Western Union was engaging in the massive modernization of its transmission facilities and services, and had already acquired, in 1968, a 50-percent interest in the newly-

formed WUCU (Western Union Computer Utilities, Inc.), a data-processing firm. (Following the corporate restructuring, WUC acquired additional data-processing firms. The Union does not contend that the employees of these and other acquired firms are part of the Western Union bargaining unit.)

Western Union was also planning to utilize its own personnel to expand further into rapidly growing, nonregulated communications-related activities. After considering a number of alternatives, and considering flexibility in financing and the limited purpose for which Western Union was incorporated in New York, Western Union decided to form WUC, a holding company incorporated in Delaware with a broader charter; to make Western Union a subsidiary; and later to carve out, from Western Union's internal personnel resources "when developments make it advisable," one WUC-wholly-owned subsidiary after another "to compete more effectively in the communications and communications-related markets into which Western Union's activities have been expanding and are expected to continue to

expand." As predicted in its 1969 proxy statement, such "non-regulated corporations will be in a position to compete on the same footing with other non-regulated companies offering competitive services."

Thus, Western Union intended to implement its plans for a single, nationwide EDC system, but it decided to do so by dividing up the business into a number of different corporate entities.

As discussed later, more was involved in the decision to divide up Western Union than the initially stated reasons, involving FCC and State regulations and restrictions, competition, and financing flexibility. Moreover the evidence suggests considerable doubt about whether there was any necessity for the first four new subsidiaries (WURC, DSC, TII, and GA) being formed, to operate as separate corporate entities. Western Union's real estate department, which became WURC, had long operated as a nonregulated activity. Western Union, before the formation of DSC, already had an active business of terminal leasing -- for use with both telegraph and

telephone circuits -- and to some extent competed with DSC after its formation. When TII was formed, about 90 percent of its functions involved the nonregulated activity of implementing and managing Western Union's modernization program, and it has not operated as a separate corporation to provide data processing to others. GA was formed to provide the latest of many gift services, which have utilized Western Union facilities. However, the issue in this case is not whether the decision to divide Western Union into separate corporations was necessary, or a good business practice. The issue is whether or not the overall bargaining unit (including some newly hired employees) remained intact.

I note that the "corporate restructuring" of Western Union has not eliminated all FCC review of nonregulated activities furnished by other WUC subsidiaries. Transactions between Western Union and WUC or any other WUC subsidiary "may be subject to review from time to time by the FCC." As further recognized in WUC's 1972 prospectus for the exchange of debentures,

the Communications Act of 1934 "authorizes the FCC to obtain from persons controlling a common carrier annual reports and such other information concerning the business and operations of such controlling person as it may require in order to enable it to perform its duties under the Act." (The FCC seeks to prevent costs related to the furnishings of nonregulated services from being passed on, directly or indirectly, to the users of common carrier services).

4. The fragmentation

a. Western Union Corporation

WUC, incorporated in 1969, became operative on January 30, 1970. Its only assets as a holding company were Western Union's stock, including 100 percent of Western Union's outstanding common stock.

All 13 of Western Union's directors were elected the directors of WUC. Four of Western Union's top officials (Russell McFall, Gerald Hoyt, John Evans, and Charles Johnston), although maintaining their positions with Western Union, became WUC's four officers. McFall then served as board chairman and president of both corporations.

WUC began assuming parts of Western Union's corporate management and other executive functions. It published Western Union's 1969 annual report, entitling it, "Western Union Corporation First Annual Report -- 1969." (Western Union did not become a subsidiary of WUC until January 30, 1970, and Western Union was WUC's only subsidiary at that time.) WUC files the federal income tax returns on behalf of Western Union (now filing consolidated returns covering Western Union and other subsidiaries), and performs a wide variety of corporate and executive functions for Western Union -- charging Western Union $1,280,000 in 1970 for "various general corporate services" (as revealed in Western Union's March 18, 1971 prospectus for the sale of debentures).

On August 25, 1970, after the first two WUC-wholly-owned subsidiaries were formed from Western Union's resources (WURC in May and DSC in July of that year), WUC transferred additional management functions to itself from Western Union. WUC Board Chairman and President McFall explained to the WUC directors "that with the in-

crease in the operations of the Corporation [WUC] and the development of its interests and activities outside of the Telegraph Company, it appears appropriate to add some executive officers <u>from the staff</u> of the Telegraph Company." (Emphasis supplied.) McFall also reported that he personally was devoting more time to WUC. The WUC directors appointed Western Union Treasurer Harry Young to assume the additional duty of WUC treasurer, and appointed other Western Union officials to serve also as WUC officials. The WUC directors approved McFall's resignation as the Western Union president, and authorized the Western Union board of directors' replacement of McFall as president with Earl Hilburn, who was an executive vice president of Western Union (and also a director of WURC and DSC). The WUC directors appointed Hilburn to serve also as a WUC vice president "in order to maintain desirable liaison" between WUC and Western Union. (McFall still remains the Western Union board chairman, as well as the WUC board chairman and president.)

On February 23, 1971 (shortly before a large number of managers, engineers, and other professional were transferred from Western Union to a new WUC-wholly-owned subsidiary, TII), WUC officials Hoyt, Evans, Johnston, and Young, as well as DSC President Zakar Zakarian, resigned from their Western Union positions, and Western Union President Hilburn and another official resigned as WUC vice presidents, "to separate the operations." However, McFall, the top official of both Western Union and WUC, remained in that dual capacity (as well as board chairman of DSC -- and later, of TII), and Charles Johnston (now executive vice president of WUC and board chairman of WURC and GA) and John Evans (vice President, general counsel, and secretary of WUC, as well as vice president of WURC and secretary of DSC and TII) remained on Western Union's board of directors. In fact, WUC officials McFall, Johnston, and Evans, along with WUC Directors Harry Figgie, Theodore Kheel, Clarence Linder, Donald Putnam, and John Rich, constitute the entire Western Union board of directors -- with the

single exception of Western Union President Earl Hilburn (formerly a WUC vice president), who is Western Union's remaining director.

Since WUC's formation, a total of 10 Western Union officials have become WUC corporate officers. Between January 30, 1970, and October 1973, a total of 41 other members of the Western Union staff (including 26 professional and 15 "confidential secretarial and confidential courier") have been transferred from Western Union to WUC.

It is clear that WUC has taken over a substantial part of Western Union's corporate and executive functions. When WUC became operative on January 30, 1970, as a holding company with a broader corporate charter, it had dual officials with Western Union, the same 13 directors, and assets consisting solely of Western Union stock. Since then, with other Western Union officials added to its staff, WUC continues to operate under the leadership of Board Chairman and President McFall, who remains in the commanding leadership

position over Western Union, as the Western Union board chairman; and he and seven other WUC officials and/or directors occupy all except one of the positions on Western Union's board of directors.

I find that from the time WUC became operative, it has been the alter ego of Western Union insofar as many corporate management and other executive functions are concerned.

(I note that in different contexts since January 30, 1970, the name "Western Union" has been used to designate either the well-known telegraph company, or WUC, or sometimes WUC together with its various subsidiaries. For consistency, the name is used in this decision as the name for the large, well-known company which continues to use that name in its advertisements -- e.g., Western Union's Mailgram, Operator 25 Service, Survey Service, and Teletypewriter Exchange Service, G.C. Exh. 239-242, and which has used that name on its letterhead as recently as the February 4, 1974 letter in evidence as G.C. Exh. 53.)

b. Western Union Realty Corporation

One of the WUC's first actions as a holding company was to authorize the incorporation of Western Union's real estate department, which handled extensive properties for Western Union throughout the nation.

WUC incorporated WURC in March 1970 as a wholly-owned subsidiary. All of the WURC directors were officials and/or directors of Western Union. Russell McFall (board chairman of both Western Union and WUC) became the WURC board chairman and chief executive officer; Aiden Redmond, Western Union's general manager of real estate, became the WURC president; Western Union Treasurer Harry Young became the WURC treasurer; and four other Western Union officials (including Western Union Vice President and General Counsel John Evans) were the other initial WURC officers. Later, Western Union Vice President and Comptroller Charles Johnston (now the WUC executive vice president) became and remained the WURC board chairman, replacing McFall who remained a WURC director.

Although WURC became operational in May 1970 (President Redmond being transferred to the WURC payroll on May 13), the staff remained on the Western Union payroll until January 1, 1971 (G.C. Exh. 152). On that date, 20 members of the staff (including 7 managerial, 4 professional, 5 supervisory, 3 confidential, and 1 clerical) were transferred from the Western Union to the WURC payroll. (The evidence does not disclose how the payroll expenses were handled or allocated in the meantime -- with one exception. The minutes of the September 26, 1972 WURC directors' meeting show that on that date, WURC agreed to reimburse Western Union for any costs incurred by Western Union from November 24 through December 31, 1970, for WURC's coverage under Western Union's pension and retirement plans.)

Western Union's real properties in 1970 (as reported in the WUC September 23, 1970 prospectus for the sale of debentures) included office buildings in Minneapolis, Philadelphia, and Albany; a warehouse in Allentown, Pennsylvania, and property in Upper Saddle River, New Jersey; long-term

leases on office buildings in Atlanta, Boston, Chicago, Los Angeles, Mahwah, New Orleans, New York, St. Louis, San Francisco, and Tampa; further long-term lease agreements being negotiated for office buildings in St. Louis and McLean, Virginia, and for a computer center in Middletown, Virginia; and about 2,000 other leases for area headquarters, branch offices, warehouses, computer and other technical facilities, storerooms, schools and garages.

Since its formation, WURC has continued to operate as the Western Union real estate department, handling real estate transactions primarily involving these and other properties used by Western Union. However, the corporate restructuring has resulted in much inter-company accounting, financing, sales, leasing, releasing,and subleasing. As an example, the property which Western Union had previously purchased for its new headquarters in Upper Saddle River was sold to WUC, which conveyed it to WURC, which constructed the building and leased it to WUC, which in turn made a sublease to Western Union. (G.C. Exh. 118-121.) WURC

now owns (as reported in WUC's July 24, 1973 prospectus) Western Union's central telephone bureaus at Moorestown, New Jersey, Bridgeton, Missouri, and Reno, Nevada. WURC also handles the leasing or subleasing of properties for use by WUC and its other subsidiaries. (Through 1973, its only charges to the other new subsidiaries were a total of about $30,000 to DSC, and none to TII and GA. G.C. Exh. 148.)

Western Union, as well as WUC, maintains a tight control over all leasing of property for Western Union's use. All leases involving Western Union require the "prior concurrence" of Western Union, and all leases and all contracts for the purchase or sale of real estate exceeding $10,000 in price require prior concurrence by WUC. (G.C. Exh. 158-159.) WURC has purchased, and leased to Western Union, some properties which Western Union previously had leased from outsiders. WURC now owns some undeveloped land (purchased from Western Union) adjacent to the Western Union headquarters at Upper Saddle River, and also some undeveloped land ad-

jacent to Western Union's Middletown and Bridgeton computer centers. In addition, WUC has authorized WURC (which had a broad corporate charter) to "landbank" about 72,000 acres of unimproved land in Colorado and Wyoming. (The minutes of the WUC directors' meeting on November 9, 1971, suggest that the unimproved land is being held strictly for speculative purposes. The directors in that meeting approved the acquisition of about 22,900 acres in an area in Colorado where Harper Sibley -- director of WUC and former director of Western Union -- "owns considerable acreage in the general vicinity," and about 25 miles from where WUC officials McFall and Johnston have some land holdings. Sibley expressed his opinion that "the acquisition represented a real opportunity for early profit in the land bank business.")

It is clear that WURC is performing much the same service as it did as a Western Union department, with few additional functions. I therefore find that WURC, having taken over the operation of the Western Union real estate department, re-

mains -- apart from the corporate veil -- primarily a department of Western Union.

c. Western Union Data Services Company, Inc.

(1) The planning

Western Union owns and leases, pursuant to tariff, about 115,000 communications terminals. According to its general counsel, Hostetler, "less than one percent" of these terminals (or fewer than 1,150 terminals) are not connected to Western Union circuitry. They are connected either to telephone or to privately-owned circuits.

When the opportunity arose (as discussed above under "FCC rulings") for Western Union to compete with noncarriers in the newly nonregulated market of leasing terminals to private wire customers using telephone circuits, Western Union assigned its vice president and manager of marketing, Zakar Zakarian, to evaluate the opportunity. Anticipating that WUC would incorporate a new subsidiary to enter this market, Western Union did not apply to the FCC either to compete in this nonregulated activity (on a nontariff basis) through a

separate department or division, or to withdraw as tariff material the terminals it was already leasing to customers using telephone circuits.

In the May 29, 1970 issue of the Western Union News (published by Western Union), an announcement was made that WUC was organizing a data services organization (DSC), and that "a cadre of [Western Union's] computer/communications specialists who have successfully designed and marketed some of the most advanced communications systems and services available, are being assembled."

(2) The new subsidiary

WUC incorporated DSC in June 1970 as a wholly-owned subsidiary, and elected seven Western Union officials as its directors. Western Union Board Chairman McFall became DSC's board chairman, and the Western Union officials, Vice President-Marketing Zakar Zakarian, Vice President and Comptroller Charles Johnston, and Associate Counsel Richard Hostetler, became DSC's President, treasurer, and secretary. These top four DSC officials continued, after their selection, to serve as offi-

cials of Western Union.

DSC became "operational" on July 1, 1970. However, as conceded by DSC President Zakarian on the stand, "We didn't have a company" at that time. He testified that "we were then in business. But we had nothing, it was myself and about 70 or 80 people. We didn't have any customers. We didn't have any orders. We didn't have any organization. We didn't have any facilities except some rented space we had gotten in a hurry. We didn't even have, you, know, capabilities at that point." (Emphasis supplied.) Although claiming to have "about 70 or 80 people," he testified, "In 1970, we installed . . . probably less than 250 terminals." Later, on cross-examination, Zakarian "guessed" that DSC purchased "maybe a couple of hundred terminals" from Western Union in 1970 (of the "less than 250 terminals" installed), and "maybe 800 plus terminals" from Western Union in the first 3 months of 1971.

If a Respondent-prepared exhibit (G.C. Exh. 165) is to be believed, DSC in July 1970 hired President Zakarian and 79 additional Western Union personnel, and West-

ern Union in July 1970 terminated them -- indicating that these 80 persons were then transferred from Western Union's payroll to DSC's payroll. The exhibit lists them as 29 officials and managers, 15 professionals, 14 sales, 3 "Tech.," and 19 office and clerical. (Zakarian testified, "I would say most of the management people with whom we started came out of [Western Union's] marketing department, leaving one assignment or one job to go into another." TII President Robert Finney testified that in 1970 -- before Western Union's planning and engineering operation, P&EO, became TII -- the terminal engineering activity in P&EO was divided into three parts. One part of the engineers -- or professionals -- stayed with P&EO; another part went to Western Union's national systems operation, NSO; and the third part was hired by DSC.) Later, according to the exhibit, from November 1970 through November 1973, an additional 83 persons were transferred from Western Union to DSC (or "terminated" and "hired"), including 13 officials and managers, 24 professionals, 7 sales, 22 "Tech.," and 17 office and clerical employees.

But there is another exhibit, minutes of the DSC board of directors' meeting on November 11, 1970 (G.C. Exh. 168), which suggests that the 80 Western Union-"terminated" and DSC-"hired" persons were not working full-time for DSC in a "clearly . . . separate and distinct" business (as contended in Respondents' brief) from July through December 1970. The November 11 minutes state that President Zakarian "reported on the status of various steps being taken to put the Corporation [DSC] on a fully operational basis . . . he reviewed plans for the transfer of the Corporation's employees from the payroll of The Western Union Telegraph Company to the payroll of the Corporation to be effective January 1, 1971." (Emphasis supplied.) I note the use of the word "transfer" in these DSC minutes.

(3) Western Union's "capabilities" provided

Despite the change in name (from Western Union to "Western Union Data Services Company, Inc."), Western Union's personnel and facilities continued to be used to develop the various parts of Western Union's

terminal-leasing business. Lacking the "capabilities" for operating a separate business, DSC entered into six different agreements with Western Union for a wide range of goods and services. (Five of these agreements were dated July 1, 1970, and the sixth was dated January 1, 1971, although all of them were signed by Western Union after February 23, 1971, when WUC -- planning the large-scale transfer of much of Western Union's engineering staff to a new subsidiary, TII -- eliminated some dual offices "to separate the operations," as discussed above.)

An EDT (exchange data terminal) agreement, dated July 1, 1970, provided that "DSC and Western Union desire to enter into an arrangement whereby the technical capability of Western Union [emphasis supplied] in the installation and maintenance" of the telephone-circuit EDT equipment "may be made available" to DSC's customers. It called for Western Union to provide installation, preventive and remedial maintenance, replacement (using Western Union parts and components), and shop reconditioning of a list of telephone-

circuit equipment, plus customer training in the mechanical operation of the equipment. The list covered Acoustic Coupled (33 ASR-KSR with integrated acoustic coupled modem), Data-Phone (models 28, 33 and 35 ASR, KSR, RO), and DAA (data access arrangement, including modem, for both manual answering and automatic answering). The work was to be performed by Western Union technicians (bargaining-unit employees).

A DDS (dedicated data system) agreement, bearing the same date, was a similar agreement (except for training), and covered selectors, models 28, 33, and 35 teleprinters, R/T (recording/transmitting) sets, and auxiliary terminal equipment. Both the EDT and the DDS agreements were signed by Western Union on March 29, 1971, after being signed by DSC on July 1, 1970.

A separate customer training agreement, also dated July 1, 1970, provided that Western Union would furnish training to customers of DSC upon its request. (This also was bargaining unit work.) Both DSC and Western Union signed this agreement on March 29, 1971.

An engineering support services agreement, dated July 1, 1970, provided that Western Union would evaluate special requirements of DSC customers, develop proposals, and "modify standard product line equipment to meet special requirements." (Emphasis supplied.) It also provided for applications engineering, industrial design and graphics support, design and drafting support, and graphic reproductions, "including binding, for distribution and for large quantities of engineering drawings and specifications." (Much of this work was to be performed by bargaining unit employees.) The agreement specifically provided that it shall not preclude Western Union from "developing, producing, using or marketing items . . . which are identical or similar to items produced for DSC." DSC signed it on August 27, 1971, and Western Union, on September 15, 1971.

The fifth agreement dated July 1, 1970 (when DSC became "operational") was the material management agreement. It covered (a) shop service for DSC at the Allentown, Pennsylvania and other Western Union fa-

cilities; (b) warehousing services (including storage areas), the receiving and shiping of DSC goods, and the maintaining of inventory records; and (c) the purchasing by Western Union of such items for DSC as high-speed printers, modems, selectors, magnetic tape cassettes and transports, other hardware, office supplies, furniture, and fixtures. It was signed about a year later, by DSC on June 25, 1971, and by Western Union on July 5, 1971.

The FAS (facilities and administrative services) agreement was dated January 1, 1971 (the date the DSC Board's minutes show that DSC planned to transfer DSC's "employees" from the Western Union to the DSC payroll). The agreement provided that Western Union would lease to DSC office space at 16 McKee Drive, Mahwah, New Jersey (at Western Union's Technology Center). It also provided that Western Union would furnish DSC the following 17 "administrative services": (a) installing, removing, repairing, and relocating telephone equipment and (b) other communications equipment used by DSC; (c) planning office layouts and interior design;

(d) mail services; (e) shipping, receiving, distributing, checking, and keeping records of goods purchased; (f) use of copying machine; (g) furnishing stationery and office supplies "used in common" by Western Union and DSC; (h) ordering and delivering other stationery; (i) furnishing office equipment and furniture; (j) furnishing cashier services, advancing funds to DSC employees for business use, cashing checks, and paying COD carrier charges; (k) making reservations for transportation and lodgings; (l) furnishing moving and relocation services for DSC employees; (m) recruiting and employment services, consisting of "receiving, routing, and processing employment resumes . . . inviting, interviewing, testing, and referring applicants to DSC, contracting for temporary help in the name of Western Union to be used by DSC, and providing wage and salary trend information; (n) medical services, including pre-employment physical examinations, and maintaining DSC employee health records; (o) preparing signs to identify DSC office areas and functions; and (p) other requested services. This agreement,

which was not signed by DSC until July 22, 1971, and by Western Union on July 29, 1971, did not provide specifically for the leasing of the premises or for any of the services for the months of July through December 1970. It provided that most of the services terminate on April 30, 1971 (nearly 3 months before it was signed). April 30 was the day before TII became operational and began furnishing many services previously provided by Western Union.

DSC President Zakarian "estimated" that in 1970, Western Union performed "less than 50 percent, maybe 45 to 50 percent of all of our installation and maintenance work." However, he gave this testimony on direct examination, before revealing on cross-examination that about 200 of the less than 250 terminals installed in 1970 were purchased from Western Union. Although manufacturers and others installed some of DSC's terminals, I consider it unlikely that DSC purchase 200 terminals from Western Union in 1970, and over 800 in the first 3 months of 1971, and had them installed by the manufacturer or any-

body else. (Zakarian did not impress me as being an entirely candid witness.) He further testified that "by the end of 1971 we had the beginning of a field organization" to perform the installation and maintenance work. (In this connection, I note that during the first 5 months of 1972, Western Union furnished DSC with 5,546 maintenance calls. G.C. Exh. 23C.) By the end of 1971 (according to the WUC 1971 annual report), there were 12 sales office and service centers in 12 major cities, and by April 10, 1973 (G.C. Exh. 15), there were 66 technicians (called service or senior service engineers) in 33 field offices and service centers. (I note that the DSC counsel wrote the Union on Decmeber 19, 1972, supplying the information that as of that time, "To the best of our knowledge, DSC has no employees whose job classifications or work is of such nature or level as it is or has been covered by a collective bargaining agreement to which the [Union] is a party." Western Union technicians, who install and maintain terminals, are in the bargaining unit.) Zakarian testified that by the

time of the trial, in 1974, DSC was performing 85 to 90 percent of the installation and service work with its own employees, and Western Union employees were performing only about 9 or 10 percent.

Western Union's total charges to DSC were $1,407,729 in 1970, $2,846,990 in 1971, $2,935,383 in 1972, and $1,049,430 in 1973.

(4) DSC's portion of the terminal leasing

DSC -- utilizing personnel, facilities, and services obtained from Western Union -- gradually began developing, on a larger scale, the business of leasing telephone-circuit terminals, which Western Union had been leasing on a smaller scale. DSC also took over part of Western Union's other terminal-leasing business, and complained that Western Union was competing with it in TWX (telephone-circuit) terminal leasing.

Western Union had regularly leased terminals to be used in connection with its telegraph-circuit communications services. DSC began taking over part of this terminal-

leasing business. As an example, Western Union contracted with Crown Zellerbach Corporation in 1972 to provide the transmission service in a new coast-to-coast DATACOM network for that customer. DSC (instead of Western Union) contracted with the customer to provide 120 leased terminals, and arranged (by contract) for Western Union technicians to install about half, and to maintain all, of the terminals. (DSC installed the other half.) DSC President Zakarian estimated that at the time of trial, DSC had 300 other terminals connected to Western Union circuits.

The problem of competition between these two WUC subsidiraires arose in 1971 and 1972, when both Western Union and DSC wanted to compete in the market of leasing terminals to TWX users (after TWX was purchased by Western Union from the telephone company -- which had agreed, as a condition of the sale, that it would withdraw from the business of furnishing low-speed terminals to Dataphone customers, as indicated in the WUC 1971 annual meeting re-

port). On October 25, 1971, DSC President Zakarian reported to the DSC board of directors that DSC's business was "being adversely affected by competition from the offering" by Western Union "of alternate DAA/TWX terminals." (As mentioned above, the July 1, 1970 EDT agreement between Western Union and DSC provided that Western Union would make available to DSC customers Western Union's "technical capability" in installing and maintaining "Data-Phone" and "DAA" telephone-circuit EDT equipment.) Zakarian repeated this complaint to the DSC directors on March 2, 1972, pointing out that DSC had lost 18 customers involving 350 terminals and $315,000 annual revenue to Western Union competition in this area and that "20 prospective new accounts involving 500 terminals and $450,000 annual revenue had also been lost." I note that finally, as revealed in the minutes of Western Union's May 8, 1973 directors' meeting, Western Union responded to the FCC ruling on terminals. As stated in those minutes, Board Chairman McFall "reviewed the Company's program to permit subscribers to

the Telex and TWX Services to provide their own terminals if they desire to do so in lieu of leasing terminals from the Company at tariffed rates. He said the program had been initiated in response to a requirement therefor with respect to the TWX Service established by the Federal Communications Commission in its [1970] Order approving the TWX Acquisition." (Emphasis supplied.) However, I also noted that this belated decision by Western Union had not -- at least not by the time of trial -- resulted in DSC taking over part or all of Western Union's business of leasing the TWX terminals. DSC President Zakarian positively testified at the trial that DSC has "no terminals on the Telegraph Company's Telex service, or TWX service for that matter." The evidence does not disclose whether Western Union or WUC plans to permit DSC in the future to compete for this terminal-leasing business.

After DSC was formed, Western Union began leasing some of its terminals from DSC, instead of purchasing them directly from the manufacturer. Since 1970, DSC

has leased to Western Union about 500 or 600 terminals -- in addition to 5,000 or 6,000 teleprinter terminals and similar equipment which DSC leased to Western Union in 1973 and later in the year sold to Western Union. DSC's total charges to Western Union were $1,366,741 in 1971, and $11,900,251 in 1973.

Meanwhile, DSC was developing the business of leasing telephone-circuit terminals. The WUC 1971 annual report indicated that DSC was having difficulty with its total-service concept "because the hardware part of its package (i.e., standard Teletype terminal equipment) had been available for years." By the end of 1972 (as indicated in the WUC 1972 annual report), DSC had 8,300 leased terminals in service (as compared to 3,850 at the end of 1971), and the models 33 and 35 teleprinters continued to provide "the bulk of its leasing revenues." DSC was purchasing and, with the part of Western Union's terminal-engineering staff which DSC had hired, was designing and developing more sophisticated electronic terminal equipment. (Both DSC and Western Union

purchase components from different manufacturers, and fabricate equipment to meet the needs of their customers.) By the end of 1973, DSC had more than 13,000 (and over 14,000 by the time of trial) low-, medium-, and high-speed terminals in service, and had developed a magnetic tape cassette buffer which operates at various speeds. About 90 percent of the terminals are connected to the telephone company system. For terminal maintenance service, DSC provides Termicare, enabling the users to call a single source (DSC's Termicare Center at Western Union's Technology Center in Mahwah) for service restoration. Western Union's plant technicians throughout the nation are under contract to make service calls when requested by DSC.

(5) Finding of division

The new corporation, DSC, was formed in 1970 exclusively with Western Union officials and directors, and it was initially staffed exclusively with Western Union personnel -- assigned primarily from Western Union's marketing department (for the managers) and from Western Union's planning and engineering operation (for the profes-

sionals). Western Union retained the DSC staff on its own payroll for a number of months after DSC began operations and, as detailed above, provided DSC with facilities and a wide range of services, thereby furnishing it with the "capabilities" to operate under the new name.

Except for the new name and the extensive inter-company contracting, Western Union was, in effect, continuing to engage in the business of leasing communications terminals for use with both telegraph and telephone circuitry. It was furnishing not only the personnel, facilities, and many services, but it was selling terminals to DSC, and then installing most or a substantial part of them for DSC. It was not until the end of 1971 that DSC "had the beginnings of a field organization," as testified by DSC President Zakarian.

DSC, as a new WUC subsidiary, was assigned different parts of Western Union's business of leasing terminals. It began leasing some telegraph-circuit terminals, as when Western Union contracted to provide Crown Zellerbach with a new transmission

service, but DSC (instead of Western Union) contracted to lease the 120 telegraph-circuit terminals. DSC also leased many terminals to Western Union itself. However, most of DSC's terminal leasing was for use with telephone circuits, for which it contracted with Western Union to make available to the DSC customers the "technical capability of Western Union" to install and maintain the acoustic coupled, Dataphone, and DAA equipment. (As discussed above, Western Union retained much of the nonregulated telephone-circuit terminal leasing business by retaining, over DSC's protests, the alternate DAA/TWX terminal business.) Meanwhile, more sophisticated terminal equipment was being designed and developed, by DSC's utilizing the expertise of the Western Union P&EO terminal engineers whom it initially hired, and the expertise of the additional professionals it continued to hire from Western Union personnel who, under the engineering support services agreement, were to evaluate special requirements of DSC customers, develop proposals, and modify the equipment to meet special requirements.

(I note that Western Union's charge to DSC for such "modification" work is specifically listed in Western Union's letter, G.C. Exh. 24, dated February 14, 1973.)

Contrary to the contention made in Respondent's brief that DSC and Western Union "clearly have separate and distinct businesses," and that "There is between them no interrelationship of operations," the evidence shows that in substance, Western Union has provided DSC with personnel, facilities, services, and expertise to develop parts of the nonregulated terminal-leasing business. In reality, DSC has operated much as a department of Western Union (with some outside contracting), although it has gradually added to its staff from sources outside of Western Union.

Accordingly, I find that DSC constitutes a division of Western Union's structure -- beginning with 80 transferred members from the Western Union staff, and the later transfer of 83 additional members of the staff -- and that DSC took over substantial segments of Western Union's active and growing terminal-leasing business.

d. Teleprocessing Industries, Inc.

(1) Mass transfer of personnel and functions

On May 1, 1971, there was a mass transfer of 476 persons (106 managers, 55 supervisors, 268 engineers and other professionals, and 47 support personnel -- G.C. Exh. 186) from Western Union's planning and engineering operation (P&EO) department to TII, a new subsidiary which WUC originally incorporated under the name, Western Union Teleprocessing Company, Inc. (G.C. Exh. 213.) An additional 44 persons (5 managers, 15 supervisors, 15 professionals, and 9 support personnel) were thereafter transferred from Western Union to TII through the end of 1973. (G.C. Exh. 187.)

Of the 476 initially transferred persons, about 431 (or 90 percent) of them were assigned to the implementation and management of Western Union's modernization program. About 341 of them were assigned to TII's Western Union systems division, and about 90 to TII's operations division. The remaining persons were assigned to administration, business planning, and

corporate development divisions. (TII President Finney gave the estimates of 5 persons in corporate development, 20 in business planning, 20 in administration, and 90 in operations -- leaving a remainder of about 341 persons to be in the Western Union systems division, in which he estimated there were between 300 and 350 persons.)

As discussed later, the Respondents contend that none of the 476 (and later 44) persons hired by TII from Western Union was performing bargaining-unit work.

Likewise on May 1, 1971, there was a mass transfer of functions from Western Union to TII. These functions fell into the following categories:

(a) Western Union design and engineering

TII President Finney testified that P&EO's role in Western Union's modernization program "ran the total gamut from services planning right through design, implementation, tests, installations and operation of these systems and facilities which carried these new services." This

work included computerizing all switching functions and many new services, including Mailgram, plus interconnecting the many services.

On May 1, 1971, all of these functions (except the management of computerized operations, discussed below) were transferred from P&EO to TII's Western Union systems division. The work was to be performed by the approximately 341 managers, engineers, computer programmers, communications analysts, mathematicians, physicists, and secretaries transferred from the P&EO engineering organization.

These transferred design and engineering functions, which included the furnishing of computer software and the development and production of otherwise unavailable computer hardware, were covered by an engineering and operations agreement, dated May 1, 1971. This agreement provided that TII would furnish Western Union with the engineering and hardware on a cost-plus basis, with TII being paid for direct and indirect costs, plus "fee to be negotiated." The agreement covered "sys-

tems engineering, design and development activities, and systems engineering studies and other consultation services." It specifically included the Mahwah develop lab and the following:

5. System Development and Implementation of ISCS-IIA/B, International Inbound Switching System [IISS], combined sending positions of the Centralized Telephone Bureaus [CTB's], and ISCS-IM Augmentation.

6. Communications Hardware Design and Development of COLMUX [communication line multiplexor] II, TWX Computer Interface (ISCS), Time Division Multiplexor/Concentrator, Terminal and Interface Equipment Development and Terminal Selectors.

7. ISCS Systems Engineering including Growth Planning and Design and New Services/System Planning and Design.

8. Other systems, engineering, and consultation as requested.

Phase I of ISCS (information services computer system -- now called InfoMaster) consisted of computer centers in New York, Chicago, Atlanta, and San Francisco, which became operational between early 1968 and

September 1969. ISCS-IM Augmentation refers to task order 9, which was attached and which provided for the completion of the augmentation program on the four ISCS computer centers by July 1971. ISCS-II refers to Western Union's huge computer complex at Middletown, Virginia, and a similar complex later in Bridgeton, Missouri, each of which would have more capacity, and be able to carry more types of services, than the entire ISCS-I network. P&EO began work on the Middletown computer center in October 1969, and on May 1, 1971, Middletown was "still in the engineering phase," as testified by TII President Finney. Three years later, at the time of trial, TII was continuing to make improvements, enhancements, and changes in the service features at the operational Middletown center, and was "doing the planning and engineering" at Bridgeton, which was begun in 1973.

The continuing magnitude of this transferred engineering work, and TII's fees for performing it, are indicated by the December 21, 1973 amendment entitled "Engineering & Operation Agreement

1973-1974." Nine of the 11 task orders attached to it are dated November 15, 1973, although 6 of them provide from performance by TII from January 1, 1973 through December 31, 1974, and provide for cost (direct and indirect costs), plus a fixed fee. The largest four of them are:

Task order 60, estimated cost of $2,872,100, fee of $213,000, covering management and operation of the Mahwah development lab.

Task order 61, estimated cost of $2,997,500, fee of $340,100, covering development of the Mailgram sytem and services, including "definitization of system requirements, systems design and analysis, programming, engineering, development lab hardware procurement, testing, implementation, cutover, and documentation," and specifically including Mailgram II preprocessor software development.

Task order 62, estimated cost of $4,469,000, fee of $499,000, covering upgrading and enhancement of numerous Western Union systems and services.

Task order 63, estimated cost of $5,426,700, fee of $505,200, entitled "Second Site Engineering & Software Development (including Disc System)," which specifically provides for message-processing

fallback capacity for Middletown at the Bridgeton site, and contains some 1975 target dates.

One of the task orders, dated November 15, 1973 (signed in December 1973) calls for the sale of hardware (C2100's pre-processor/multiplexors, with specified optional equipment) for the estimated cost (fee included) of $2,080,000, with approximate delivery dates from October 29, 1973, into 1975.

TII's total charges to Western Union were $24,934,000 in 1972, and were estimated to be about $22,000,000 in 1974 (as reported for 1972 in the Western Union March 8, 1973 prospectus, and as estimated for 1974 in the Western Union 1973 annual report).

(b) Western Union computer operations

Between 1965 and 1967, Western Union had signed PWS (public wire system) computer software maintenance contracts with Dun & Bradstreet, 3M Company, Trane Company, and Reynolds Metal Company to maintain their software systems. In 1967, Western Union had signed a lease and service agreement

with Bankers Trust Company, covering Western Union's computer-controlled private wire teletype system, called Bank Wire, connecting member banks. In 1968, SICOM (security industry communications) became operational. By March 22, 1971 (the date of WUC's prospectus for the sale of common stock), SICOM (one of Western Union's "hybrid" services) had been expanded by P&EO to provide a data-processing Order Match service. IISS (international inbound switching system) was a new system being developed by P&EO. And as indicated above, ISCS-I was a network of four computer centers which had been operational since 1969. ISCS-IM was an augmentation program scheduled to be completed in July 1971.

The ISCS-I computer centers were in New York, Chicago, Atlanta, and San Francisco. The Bank Wire computer centers were in New York and Chicago. The computers for SICOM and IISS were located at Western Union's Technology Center at Mahwah.

On May 1, 1971, the management of all these functions was transferred from Western Union's P&EO to TII. The above-mentioned May 1, 1971 engineering and operations agreement provided that TII would take over the operation of all the computer centers, and specifically listed (1) the Mahwah communications room operation and management; (2) the operation and management of ISCS-I, ISCS-O, Bank Wire, and IISS; and (3) the private systems software maintenance.

The task orders attached to the agreement speicifed these transferred functions. Task order 3 provided that TII would "manage the operation and maintenance of the Bank Wire computer centers located in New York and Chicago," and would "maintain the software system." Task order 4 provided that TII would "maintain the software systems" for the four listed companies, pursuant to Western Union contracts dated from 1965 through 1967. Task order 1 provided that TII would "manage the operation and maintenance of the ISCS-IA, ISCS-IM, IISS computer centers located at New York, Chicago, San Francisco, Atlanta, and Mahwah"; would provide "Service to Western Union

offices (PMS [public message system -- such as telegram] Traffic)"; and would "maintain the software system and exercise control over all routine changes which may be necessitated because of operational problems." (Emphasis supplied.) These task orders provided that TII would be paid for direct and indirect costs, plus fee to be negotiated. Western Union Assistant Vice President Charles Scott, who had been in charge of P&EO's information systems operations, was transferred to TII and made vice president and general manager in charge of TII's operations division. He and all the other non-bargaining-unit members of the P&EO operations staff (about 90 in number) were transferred on May 1, 1971, to TII. The contracting for the services of the bargaining-unit employees is discussed later. (I note that other P&EO department activities, which were to remain in Western Union, were transferred out of P&EO and into NSO -- national systems operation -- before May 1, 1971, the date of the mass transfer to TII.)

However, a change in the management of these computer functions was made shortly after the Union sent its April 17, 1972 letter to Western Union. The letter requested information about the relationship and intercompany contracting among the various WUC corporations, and questioned whether the new corporations were "confining themselves to executive or policy functions and personnel" (as discussed hereafter). On May 11, 1972 (less than a month later), TII President Finney issued an organization announcement which began:

> As announced by the Board of Directors of the Western Union Corporation and the Western Union Telegraph Company on May 9, 1972, effective May 14, 1972, Mr. Charles R. Scott has been appointed Vice President-Operations-National Systems Operation in the Western Union Telegraph Company. (Emphasis supplied.)

Finney also mentioned in the announcement the transfer of the TII operations function to TII's Western Union systems division (later called the engineering and operations division). The announcement was signed by Finney and initialed under the word, "Concurred," by WUC Executive Vice President Gerald Holt.

Concerning TII President Finney's challenged credibility, I note that on cross-examination, Finney testitied that Charles Scott "was hired away from us [emphasis supplied]." (Earlier in the proceeding, Finney had endeavored to give the impression of TII's independent action by emphasizing that the Western Union personnel had not been "transferred" to TII.) However, Finney recognized at the time that Scott's movement back to Western Union was a transfer. The minutes of the May 15, 1972 TII directors' meeting show that Finney reported that Scott had been "transferred" to Western Union. In addition, I note that Finney was also asked on cross-examination, "Was [the hiring of Scott by Western Union] cleared with the Western Union Corporation at all?" Despite Finney's wording of the above-quoted May 11, 1972 organization announcement (that both the Western Union and WUC board of directors had announced Scott's appointment to the Western Union position), and despite the written concurrence by the WUC official on the announcement, Finney answered the question, "Not that I know of." (He im-

pressed me as being less than candid when testifying about this, as well as when testifying about a number of other matters.)

Shortly after TII Vice President Scott was transferred back to Western Union, all of the above-described operational work, and Scott's entire former TII staff, consisting then of 93 persons (including 23 managers, 35 supervisors, 3 engineers, 26 professional, and 6 support personnel -- G.C. Exh. 186) were also transferred back. TII retained the management of Western Union's computer operational function only in connection with the implementation of ISCS-II, until the Middletown and Bridgeton computer centers were "netted and playing together." TII President Finney was not persuasive when he testified that the original plan had been for TII to manage the operation of the computer facilities only until the engineering was completed and the new systems "reached a steady state of operation." When he so testified, he ignored the fact that most of these computer operations (except ISCS-II) had been performed by the Western Union personnel on a routine basis for

years. The ISCS-IM augmentation program was scheduled for completion in July 1971, and the IISS had not been completed at Mahwah, but that fact obviously did not necessitate Western Union Vice President Scott and the entire P&EO operations staff being transferred to TII for over a year. I note that Finney agreed with the suggestion made by Respondents' counsel in a leading question that "in a sense" this computer operations function was a training program, and that Finney also claimed that this was true "in a real sense," pointing out that "in the computer services industry it's common to have facility management contracts on a temporary basis which involves training people." However, Western Union regularly carries on its own training program, and Finney gave no explanation why any further training of the operations personnel required the transfer of the entire non-bargaining-unit operations staff (consisting almost entirely of managers, supervisors, engineers, and professionals) from Western Union to TII for over a year.

I find instead that after the Union's

April 17, 1972 letter, there was a change in plans, reversing the original decision to have TII manage Western Union's computer operations on a regular basis.

(c) Western Union administrative functions

Until April 30, 1971 (the day before TII became operational), Western Union was providing DSC with a wide range of 17 listed "administrative services" at the DSC headquarters in the Western Union Technology Center at Mahwah, as discussed above.

On May 1, 1971, Western Union's P&EO personnel (including 106 managers and 55 supervisors) were tranferred from Western Union to TII. This transfer included Western Union's Mahwah personnel who had been supervising the Western Union bargaining-unit employees assigned to furnish both Western Union and DSC with administrative and other services. Thus, on May 1, Western Union did not have the supervisory personnel at Mahwah to continue providing these services for itself and DSC, or to begin furnishing such services to TII which like DSC, became "operational"

purportedly without any bargaining-unit personnel. Bargaining-unit employees remained on Western Union's payroll, but the supervisors were then on TII's payroll.

The problem was solved by TII taking over additional functions from Western Union. TII signed a FAS (facilicites and administrative services) agreement, dated May 1, 1971, to provide Western Union with 20 listed administrative and other services, "all in the manner and to the extent that such administrative services shall be of the kind performed by [TII] for its business." These services were quite similar to the above-listed 17 "administrative services" which Western Union had been performing for DSC, and also included building management, payroll, and employee records services for Western Union. (TII likewise furnished administrative services to DSC, and to WUC, whose headquarters was moved from New York to Western Union's Technology Center in Mahwah.)

The May 1, 1971 FAS agreement provided that Western Union would pay TII the basic

sum of $83,800 a month for the administrative and other service functions which had been transferred from Western Union to TII, plus additional itemized reimbursements. About 20 P&EO managers, compensation and employee relations specialists, building management engineers, and secretaries were in this TII administration division. I note that one of the transferred functions -- agreed to separately from the FAS agreement -- was for TII to handle the first step of the grievances filed by Western Union bargaining-unit personnel at Mahwah. (TII's contracting for services of these union employees is discussed later.)

(d) Developing computer communications systems

In 1964, 7 years before Western Union's P&EO became TII, Western Union began providing customers a "custom-design" service of developing computer communications systems. As discussed above under "Regulated and nonregulated activity," this service included studying the customer's needs, developing a total information system, selecting the hardware (or designing equipment not available commercially),

installing the computer and data-processing equipment, developing the software, and servicing the new management information system. The Western Union May 6, 1969 prospectus revealed that several of these "custom designed" systems use "advanced digital computer technology in order to provide accounting, production planning and scheduling, inventory control and distribution, and other management functions while satisfying communications requirements."

On May 1, 1971, these functions were transferred to TII -- plus systems management (which apparently had originally been intended to be performed by TII's then separate operations division). As reported in the WUC July 26, 1972 prospectus, TII "is engaged in the business of designing, developing, installing and managing computer communication systems. Included within its services is the supply of all requirements for hardware, software, peripheral equipment and support services needed for the customer's system. TII has absorbed the planning and development engineering resource capabilities" of

Western Union.

However, for many months after May 1, 1971, TII was to be engaged primarily in completing and managing Western Union's computer facilities at Middletown and Bridgeton. As testified by TII President Finney, this modernization work for Western Union "really required just about all of our resources" and "it just did not make business sense to take significant resources off of that to develop new business." In fact, on the date of the transfer, there were only about 20 engineers, marketing, "business planning type" people, and secretaries in the Western Union P&EO's business planning function who were transferred to TII. These constituted only about 4 percent of the 476 transferred P&EO personnel.

(e) Corporate development

The approximately five remaining transferred P&EO persons were in the corporate development operation, whose function was "making investigations and carrying out negotiations for the acquisition of other companies" for WUC. This small group constituted about 2 percent of the

transferred personnel, as compared to 90 percent who were assigned directly to Western Union's modernization program.

(2) The new subsidiary

WUC incorporated TII as a wholly-owned subsidiary, and elected Russell McFall (board chairman and president of WUC, as well as board chairman of Western Union and DSC) to be TII's board chairman; John Evans, Charles Johnston, and Gerald Hoyt (officials of WUC and former officials of Western Union) as three additional directors; and Western Union Vice President Robert Finney (who had headed Western Union's P&EO) as the remaining director. Under McFall as board chairman, the other TII top officials were Finney and Evans as president and secretary, and WUC Treasurer Young as the TII treasurer. (Evans, Johnston, Hoyt, and Young had resigned as Western Union officials in late February 1971, when the activation of this new corporation was being planned.)

TII, which became operational on May 1, 1971, has not operated as a separate data-processing company, to provide data process-

ing to outside customers. (As discussed above under "FCC rulings," the FCC decided in the Computer Inquiry that the furnishing of unregulated data-processing services to others must be through a separate corporate entity which -- unlike TII -- must have separate operating personnel and computer equipment from the common carrier.) Before TII was formed, Western Union had already acquired a 50 percent interest in one data-processing company (WUCU) in 1968, and WUC had acquired the stock of another data-processing company, Distronics Corporation, in March 1971. (In paragraph 38 of the above-mentioned Tentative Decision, dated April 3, 1970 -- over a year before TII was formed -- the FCC recognized that Western Union and another carrier already "have organized or acquired separate affiliates for the promotion and sale of data processing services.") Distronics, and two other data-processing companies which WUC later acquired were placed under TII's management control. (As previously indicated, the employees of these and other acquired companies are not in issue in this proceeding.)

Western Union provided TII -- like DSC -- with the "capabilities" to operate a business without the required bargaining-unit employees. Western Union not only provieed TII with the necessary bargaining-unit employees (under agreements discussed later), but it provided TII under one of the agreement (the May 1, 1971 general services agreement) with purchasing, accounting, engineering support, and shop services. In evidence are a large number of 1971 and 1972 TII task orders (G.C. Exhs. 21-N and 21-O) under which Western Union provided TII, pursuant to this agreement, with the services of bargaining-unit wiremen, fabrication and assembly, electrical installations, design and assembly draftsmen, typing and reproduction services, etc. Western Union's total charges to TII were $8,316,542 in 1971, $838,039 in 1972, and $732,145 in 1973. (G.C. Exh. 203.) TII President Finney explained at the trial, "You must remember that when TII was formed it wasn't a full company. It started out with a technical resource and it needed to develop all the necessary

functions of a company, finance, purchasing, marketing, and so on."

TII's role of providing new computer communications systems was slow in developing. In 1971 and 1972, it made three separate offerings, all unsuccessfully, and made few sales of the hardware which it had already developed for Western Union. (I note that in the sales brochure, "Data on Demand," TII stated that it had designed and developed software programs for 48 computers supporting Western Union's information networks, and had designed and developed for Western Union such hardware products as the pre-processor/multiplexor (C2000), the system console/line switch (Llooo), a terminal controller, and the automatic calling and answering unit (ACAU), "a unit to allow computers to call and answer terminals through the telephone, Data-Phone and TWX teleprinter networks." It made further offerings in 1973, but a large majority of its sales of systems designs, software, and hardware have been after May 22, 1973, when the Union's recognition request was made. Meanwhile, TII was contracting with Western Union (appar-

ently on a verbal basis) for Western Union to install and maintain TII equipment, as revealed in Western Union's February 14, 1973 letter (G.C. Exh. 24), listing among its charges to TII the "Installation and maintenance service charges on equipment of affiliate."

(3) Profits from Western Union work

When questioned on direct examination about the transfer of work from Western Union's P&EO to TII, President Finney mentioned "four different factors." He stated, first, WUC's desire to diversify into nonregulated business; second, "the very excellent technical resource" in P&EO; third, Western Union's diminishing need for this level of expertise as the modernization program would come to an end in the foreseeable future, and fourth, the requirement of the Computer Inquiry (that data processing be in a separate corporation).

However, on cross-examination, TII President Finney revealed a further consideration -- which could explain why the mass transfer of personnel and functions

occurred when, as discussed above, only about 4 percent of the P&EO staff was available for internal development of outside business. He testified:

> And also the discussion that it would be extremely desirable and valuable all the way around [for this resource to be retained, and] the completion of this work for the Telegraph Company . . . would give the new company, TII, both the financial base and the capability base from which to seek new business. (Emphasis supplied.)

Finney was referring to the sizable fees TII would charge for the system design, engineering, software, and hardware it would furnish Western Union at the Middletown and Bridgeton computer centers -- for use by Western Union to provide primarily FCC-regulated services to the public. As already noted, four of the November 15, 1973 cost-plus-fixed-fee task orders (apart from many other orders over several years) provided that TII would charge Western Union fees (above direct and indirect costs) of $213,000, $340,100, $499,000, and $505,200 -- totaling $1,557,300. (It was not an issue in this proceeding whether or not the transfer of Western

Union's P&EO department to TII, and the charging of these fees -- or, for that matter, whether the many other intercompany charges between Western Union and the various new companies -- adversely affected the rates on Western Union's tariffed common-carrier services.)

(4) Finding of division

Whatever were the reasons for Western Union and WUC wanting to place Western Union's P&EO personnel and functions in another WUC subsidiary at a time when 90 percent of the personnel would be working directly on Western Union's modernization program, it is clear that Western Union's work was thereby being fragmented and that TII constituted another division of Western Union's structure.

e. GiftAmerica, Inc.

(1) The planning

For years, Western had offered the public a number of so-called "Instant Gifts" services (see glossary of services in the WUC 1970 annual report), such as the DollyGram, CandyGram, Perfume-by-Wire, and Flowers-by-Western Union (as listed in Western Union's

1969 proxy statement). All of these were non-FCC-regulated services, which were available to persons sending telegrams.

In 1970, Western Union and WUC began planning the offering of a new "Instant Gifts" service which would utilize Western Union's personnel and its new computerized facilities, without the sending of a telegram. Market studies were made to determine high-demand items to sell; negotiations were conducted with manufacturers to provide the merchandise on a consignment basis to franchised dealers; a logistical study was made of warehousing and shipping; and Western Union personnel were assigned to take part in some of the planning work.

WUC incorporated a new subsidiary (under the name of Instant Gift Corporation -- later renamed GiftAmerica, Inc. -- herein called GA) on June 24, 1971, to provide the service. However, before the first meeting of GA's board of directors, the decision had already been made for the use of Western Union's personnel and facilities, as well as TII's services.

On February 22, 1972, George Jochum (on the Western Union staff) met with the WUC directors and "discussed the operating aspects of the project," including the use of one of Western Union's central telephone bureaus and TII's "development of the necessary software." Thereafter, in an accounting agreement dated as of March 1, 1972 (and signed in June by the same Geroge Jochum -- then serving as GA's vice president of operations), Western Union agreed to provide GA with payroll processing, advancement and disbursement of funds, maintaining personnel records, preparing reports of GA personnel earnings and withholding taxes for government agencies, processing invoices, making monthly computer readout reports, etc.

(2) The new subsidiary

WUC officials Charles Johnston, John Evans, and Harry Young (all former Western Union officials) were selected by WUC to be GA's first directors. Russell McFall, who was board chairman of Western Union, WUC, DSC, and TII, became the fourth director in January 1973, several months before GA became operational -- on September 1, 1973.

On May 25, 1972, the GA directors held their first meeting. They elected all except one of GA's new officers from the staffs of WUC and Western Union. WUC Vice President-Finance Johnson (formerly the Western Union vice president and comptroller) was elected board chairman and president; WUC (and former Western Union) staff members Evans, Young, and Donald Wrobel were elected vice president, treasurer, and comptroller; WUC staff member Edwin Alley became secretary; and Western Union staff member George Jochum (mentioned above) was elected vice president-operations. J. M. Hoffman (apparently an outsider) was elected vice president-marketing.

Beginning in April 1972, members of Western Union's staff, and some of WUC's staff, were transferred to GA. These included 27 Western Union personnel (22 managers, 1 professional, and 4 clerical), and 4 WUC personnel (3 managers and 1 professional). One professional was transferred from TII. Meanwhile, GA was hiring some outside personnel (including a new president, national sales director, ad-

vertising manager, promotion manager, and electronic data processing manager). GA also hired a staff of district and regional managers, who sold dealer franchises, primarily to pharmacists with good display areas and delivery capability. (WUC guaranteed the refund of dealership fees in the event GA was unsuccessful.) Contracts were signed with the manufacturers and for the warehousing and shipping of the merchandise.

Beginning in July 1973, Western Union trained between 350 and 400 of its R/T (recording/transmitting) operators and R/T supervisors (members of the bargaining unit) at Western Union's Bridgeton CTB (central telephone bureau) to handle GA customers' orders from throughout the nation. Although these R/T operators and supervisors (many of whom were newly hired) remained Western Union employees, they were taught when receiving GA calls to identify themselves as "GiftAmerica," to give a fictitious name, and to take the order. If asked, "Who is GiftAmerica?" they were told to answer, "GiftAmerica is a subsidiary of Western Union which has been in the

gift business with CandyGram, DollyGram, and flowers by air for many years." When GA became operational in September 1973, the R/T supervisors and operators at the Bridgeton CTB rotated between receiving and recording the GA calls (and transmitting the information to the GA service center nearby), and transacting business for Western Union (receiving and recording public messages and transmitting them into the Western Union computers at Middletown).

In 1973, Western Union charged GA a total of $1,126,542 for its services to the new subsidiary. Of this amount, about $1,007,000 (as revealed in Western Union's 1973 annual report) was charged GA for "operator assistance services" under a verbal understanding (described in the report as being "on a preliminary non-contractual basis"). I note that there is in evidence a service agreement between Western Union and GA, dated as of September 1, 1973, and that the agreement is signed by GA Vice President Jochum and by a Western Union vice president. However, unlike other intercompany agreements in evidence, the "date" lines at the

bottom of the agreement are left blank. (I assume that the agreement was signed sometime after 1973 but before it was introduced into evidence in April 1974.)

The undated services agreement states that in order for Western Union to provide the "order entry service" (for which GA would pay $1.61 a call for the anticipated volume), Western Union would furnish GA the personnel (trained at GA's expense), building space, equipment, "National INWATS lines" (the wide-area telephone lines which Western Union was using in its public message services), and the computerized "CRT [cathode ray tube visual display terminal] devices and controllers." The equipment listed in the agreement for Western Union to furnish included 160 CRT four-phase terminal devices, 5 four-phase CRT controllers, 160 operator recording desks and chairs, and 8 supervisor desks and chairs.

Meanwhile TII (using personnel transferred earlier from Western Union's P&EO department) was developing the necessary GA software for use by the Western Union

operating and maintenance personnel at the Bridgeton CTB and by GA personnel at the nearby service center where GA was leasing a computer (from an outside company). TII charged GA a total of $157,813 in 1972 and $967,746 in 1973.

The new GA gift service was announced in the Western Union Telegraph Company News dated September 4, 1973, with a photograph of McFall (board chairman of Western Union and WUC) and Johnston (board chairman of GA and executive vice president of WUC) viewing a display of the 16 GA items for sale. The announcement mentioned GA's main offices in Western Union's new headquarters building in Upper Saddle River, GA's computerized order centers in St. Louis (nereby Bridgeton), and "its nationwide network of nearly 6,000 participating retail outlets across the country." Describing the role of the GA shopper guides (Western Union's R/T supervisors and operators at the Bridgeton CTB), the article stated: "By the fingering of a button or two on her console, the shopper guide can obtain almost immediate responses from the computer while the in-calling customer is

still on the phone," to determine if the dealer has the item in stock, if the customer's credit card is valid, etc.

The integration of the new GA service into Western Union's public services is further indicated by the WUC 1973 annual report in which Western Union and GA gift services were alluded to: "Within three rings, the American public can now reach Western Union's Central Telephone Bureaus -- by far the world's largest telephone answering network. Mailgrams, Telegrams, cable-grams, and even gifts are just a quick toll-free call away, 24 hours a day, seven days a week." (Emphasis supplied.)

However, I note that GA was not as successful as anticipated. Around the end of 1973, 152 of the specially-trained Bridgeton R/T supervisors and operators were laid off (furlough force reductions) by Western Union because the volume of GA calls "has not reached its anticipated level." At the end of 1973, GA had liabilities of $27,860,000, repayment of $19,983,000 of which had been guaranteed by WUC. By the time of trial, the GA

executive positions of president and merchandising manager were vacant, as were 9 of the 11 bargaining-unit-level classifications (such as service operators and computer operators) in GA's communications and electronic data processing divisions at its service center near the Bridgeton CTB. (G.C. Exh. 195, 196). Some of the former Western Union and WUC personnel had been transferred back. Charles Johnston (executive vice president of WUC and formerly vice president and comptroller of Western Union) remains as board chairman and "chief executive officer" of GA, which shares Western Union's new headquarters building and used the same address as Western Union (One Lake Street, Upper Saddle River).

(3) Findings of division

It is clear that GA -- as WURC, DSC, and TII before it -- constituted a division of Western Union's structure. Although GA provided a new gift service, the service was similar to the earlier Western Union gift services, except that it was handled through Western Union's facilities without a separate telegram.

Western Union and WUC planned the new service and contributed virtually all of the initial officers and corporate directors, and many members of the managerial staff thereafter. Western Union provided GA with facilities for its headquarters; furnished GA with various "accounting" services; and shared the use of Western Union's Bridgeton CTB (central telephone bureau), including the use of its nationwide INWATS telephone lines. Western Union furnished GA with a considerable amount of computerized equipment at the CTB, including 160 CRT terminal devices and 5 CRT controllers, plus desks and chairs. Western Union hired additional R/T employees, and trained them and its other R/T employees to act as GA shopper guides. Moreover TII (found above to be a division of Western Union) developed all of GA's computer software for use at Western Union's Bridgetown CTB and at GA's nearby service center.

In substance -- apart from the corporate veil -- the new gift service was another service of Western Union, whose facilities

and services were essential to GA's operation.

C. Nonunion Transfer Policy

1. Deliberate decision made

As discussed above, the Respondents have given various reasons for the fragmentation of Western Union (called "corporate restructuring"). In addition, one of Respondents' witnesses revealed at the trial another consideration: that it was "extremely desirable" to give TII a "financial base" (from the fees charged Western Union) "to seek new business."

The Respondents deny that there was a further, antiunion motivation. In their brief, the Respondents insist that there is "no evidence that the unionized status of Telegraph prompted the structuring of WUC and the new subsidiary corporations." At the trial, Western Union General Counsel Hostetler was asked, "Was there any discussion of labor organizations, collective bargaining with respect to the restructuring?" He responded, "Yes. There was some discussion in the context of how it would occur and how it would be done after the restructing. But that was not a

factor in the restructuring." He added that "regardless of what the answer might have been on a projected basis regarding the labor union situation, we would have restructured in exactly the same way." He did not explain why union (bargaining-unit) employees were not transferred along with the nonunion (non-bargaining-unit) personnel. When TII President Finney was asked, "In the planning for the formation of TII, was there any discussion of the union contract or supervision of bargaining unit personnel?" he answered: "Only peripherally. I'm sure it came up. We discussed all aspects of the formation of the company. And I'm sure it came up, but peripherally."

However, whether or not Western Union was originally motivated, at least in part, by a desire to operate certain nonregulated parts of the business on a nonunion basis, the evidence clearly establishes that Western Union and the other Respondents adopted a deliberate policy against transferring Western Union's union employees from the Western Union bargaining-unit jobs to bargaining-unit-level jobs with

any of the new corporations.

Respondents' counsel avoided asking about this nontransfer policy when he asked DSC President Zakarian about a refusal-to-hire policy:

> Q. Did you adopt or pursue any policy in your company of refusing to hire any person because they were or had been in the union or bargaining unit?
>
> A. Obviously not. (Emphasis supplied.)

When TII President Finney was asked on cross-examination whether TII's failure to hire any of the bargaining-unit personnel, at the time of TII's formation, was "pursuant to a deliberate decision," he gave this answer:

> Q. No. I think the answer is no. Everything we did was pursuant to deliberate decisions. But these, I think the deliberate decisions we made involved the kind of business we wanted to get into. So, you know, yes, there was a deliberate decision that we did not know our requirements right then for certain types of people. So there was, in that sense, a deliberate decision that we would not hire those kinds of people. Or there was another deliberate decision that we would subcontract or use

> temporary personnel for certain things, again for the same reason. But I don't think that's equivalent to the deliberate decision you mentioned, so I think the answer is no.

A forthright answer would obviously have been "Yes," that a deliberate decision had been made not to offer to hire or transfer the union employees. Otherwise, the 476 P&EO non-bargaining-unit personnel would not have been transferred alone to TII, without at least some of Western Union's bargaining-unit support personnel.

2. The pattern followed

The same pattern was followed upon the establishment of each new corporation.

From the time WUC became operational on January 30, 1970, until October 1973, a total of 41 persons (in addition to corporate officials) were transferred from Western Union to WUC. (Twenty-two of these 41 persons remained on the WUC payroll at the time of trial. G.C. Exh. 75.) These transferred employees included 26 professionals, but according to the Respondents, not a single bargaining-unit employee was included. Although a total

of 14 secretaries and 1 courier were transferred to WUC, the Respondents contend that all of them were "confidential" -- presumably even those who may have been assigned to work with the nonmanagerial, professional employees. (The General Counsel and the Union contend that the new corporations unilaterally changed the classifications from included bargaining-unit secretaries and clerks to excluded "confidential" secretaries and clerks. Both the 1968 and 1971 collective-bargaining agreements between Western Union and the Union contained an Appendix B which provided that the excluded titles -- such as "confidential" employees -- require mutual agreement through negotiations before the "positions may be established beyond the number listed in Appendix B therefor or beyond the number presently in existence, whichever is greater." However, if the bargaining unit has remained intact, any dispute over whether a particular employee is "an aide to an officer, management employee who deals in employee relations matters" -- as a confidential employee was defined by Union

President Dan Beckstead at the trial -- could be resolved through the grievance and arbitration procedure. Meanwhile, it is noteworthy that secretaries were transferred from Western Union to the new corporations only if they were to be non-union "confidential" employees.)

When the next corporation, WURC, became "operational" in May 1970, the bargaining-unit employees again remained on the Western Union payroll. (In fact, all of the Western Union real estate department staff, except the general manager, remained on the Western Union payroll until January 1, 1971, when they were transferred to WURC.) Between January 1, 1971, and October 1973, a total of 25 Western Union persons (including 7 confidential and 1 clerical) were transferred from Western Union to WURC. (Concerning the one "clerical" employee, who was transferred to the WURC payroll on January 1, 1971, and back to the Western Union payroll on April 3, 1971, the Respondents contend in their briefs that her brief tenure with WURC "would seem clearly to be" a "de minimis crossover" and "insignificant.")

The next corporation, DSC, became "operational" 2 months later, in July 1970. A total of 80 Western Union personnel, primarily from the marketing and P&EO departments, were selected (but, as indicated previously, they apparently remained on the Western Union payroll until January 1, 1971). Thereafter, through November 1973, an additional 85 Western Union personnel were transferred (or "terminated" and "hired," as shown on Respondent-prepared G.C. Exh. 165). Concerning the original group, the Respondents contend in their brief that "DSC began with a group of professional management people and a minimal support staff, consisting entirely of non-bargaining unit secretaries." Concerning those who followed, DSC President Zakarian testified that none of them came from the Western Union bargaining unit, with only four exceptions. These few exceptions do not disprove the policy against transferring bargaining-unit personnel. One was a Western Union salesman on vacation from his job in Florida. Zakarian testified that a "subsequent analysis" revealed that this employee had gone at his own expense

to New York, where he applied and was hired as a salesman by DSC. The other three, "as I [Zakarian] subsequently have gone back and analyzed," were acquaintances, recruited by two managers or officials, one or both of whom were themselves hired from outside Western Union (and who, therefore, may not have been aware of the nontransfer policy).

Even when the entire P&EO department became TII on May 1, 1971, and TII took over many functions previously performed by Western Union, Respondents contend that no bargaining-unit employees were transferred. A total of 476 persons were transferred from Western Union to TII on that date, and an additional 44 persons were transferred between then and the end of 1973. The latter included two bargaining-unit secretaries, Leslie Bilz and Sandra Vick, who were transferred to TII in February 1972 when they were reclassified as confidential secretaries. (R.W. Exh. 30; Tr. 142-143.)

The same pattern was followed when GA, the latest new corporation before the time of trial, was staffed. A total of 32 per-

sons were transferred (27 from Western Union, 4 from WUC, and 1 from TII). As summarized in Respondents' brief, "Of the 32 employees with previous employment with one of the other respondents, all but two were hired into either managerial, professional, or confidential positions. . . and there is no evidence that any were in the Telegraph bargaining unit prior to hire by GA."

I therefore find that the evidence does establish that the Respondents did adopt a policy against transferring Western Union's union employees, and that their intention was to operate WUC, WURC, DSC, TII, and GA on a nonunion basis.

On the other hand, the evidence does not establish that any of the new corporations went further and refused any Western Union employees' request to be hired. To the contrary, the one (current) Western Union salesman who did apply for DSC employment was hired. I do not speculate why apparently none of the thousands of laid-off or terminated Western Union bargaining-unit employees applied to work for

the new, nonunion companies. (Between 1971 and 1973, as reported in the WUC 1973 annual meeting report, the number of employees in the Western Union bargaining units declined from about 20,000 to about 12,000.) At the trial, near the end of Respondents' defense and after Respondents' nontransfer policy had been established, the General Counsel attempted in his cross-examination of DSC President Zakarian to develop facts on which a finding of illegal discrimination against the "extremely qualified" laid-off Western Union plant technicians could be based -- without first alleging any Section 8(a)(3) violations. (Zakarian had testified that to his knowledge, there were never any Western Union employees hired by DSC in its "field installation and maintenance capabilities.") Respondents' counsel objected to any questions about whether Zakarian "undertook to find out whether there were unemployed union people," asserting that this "could only bottom a 8(a)(3) charge." The General Counsel stated that "there may very well be a [Section 8(a)(3)] violation," but "I'm not going to amend my complaint after

the answer is in." In the absence of any Section 8(a)(3) allegations, I sustained the objection. Accordingly, I do not rule on whether DSC unlawfully discriminated against any of the laid-off Western Union technicians. (I note that the number of plant technicians employed by Western Union in all divisions increased after Western Union purchased and expanded the TWX system, but that the number decreased between September 1972 and September 1973 -- despite continued expansion of TWX -- when DSC was performing more of its own installation and maintenance work with newly-hired nonunion technicians. The laid-off union technicians had seniority only division-wide.)

D. Replacement of Union with Nonunion Employees

When the first four of the new corporations became operational (WUC, WURC, and DSC in January, May, and July 1970, and TII in May 1971) and took over the above-described segments of Western Union's functions and activities -- without hiring the union employees who had been performing the nonconfidential bargaining-unit support

work -- there was no immediate interruption in the performance of the support work by the union employees.

Western Union's headquarters was then in New York City. Both WUC and WURC occupied the same headquarters, and Western Union's employees performed support work for them. In 1971 WUC moved its headquarters to Western Union's Technology Center in Mahwah, New Jersey, and TII began performing much of the support work. To perform this work for WUC, TII contracted for the services of some of Western Union's Mahwah employees, whom TII replaced with nonunion employees in 1973 when Western Union's headquarters was moved from New York to Upper Saddle River, New Jersey, and most of Western Union's Mahwah employees were offered employment at the new headquarters. WUC's only nonmanagerial, nonprofessional employees are classified as confidential. The headquarters of WURC is still in New York. As discussed above, it continued to operate as a department of Western Union, and the non-bargaining-unit employees remained on Western Union's payroll until January 1, 1971 (over 7 months

after WURC became "operational"). I therefore find that during this period, Western Union continued furnishing WURC the support work it provided other departments at its headquarters, and further find that in the absence of any WURC nonconfidential support personnel, Western Union continued to provide such support work to WURC until 1973 when Western Union's headquarters was moved to New Jersey. (As an example, Western Union photographer Peter Tague -- before he was laid off in September 1973 -- did photographic work for WURC at the New York headquarters.) Since then, Western Union employees have continued to process employee benefit claims for WURC, as discussed later, but the evidence does not disclose who is performing other nonconfidential support work for WURC.

Much more bargaining-unit work was involved when DSC and TII were formed. Although there was no immediate interruption in Western Union employees' performing this work, DSC and TII later began replacing many of these union employees with nonunion employees.

DSC became "operational" on July 1, 1970, but the initially-selected non-bargaining-unit employees remained on Western Union's payroll until about January 1, 1971. Thereafter, between March 29 and September 15, 1971, Western Union signed a series of six agreements (dated back to July 1, 1970, and January 1, 1971, and described above under "Western Union's 'capabilities' provided"), under which Western Union provided DSC with a wide range of services by bargaining-unit employees. These services enabled DSC to take over part of, and expand, Western Union's business of leasing telephone-circuit communication terminals, and also to take over part of the business of leasing telegraph-circuit terminals. These services included installation, maintenance, replacement, and shop reconditioning of terminal equipment; training of DSC customers; modifying DSC equipment to meet special requirements; providing graphic support and reproductions, drafting support, shop service, warehousing, and receiving and shipping; purchase of terminal equipment and office supplies and fixtures; and, under the

January 1, 1971 FAS agreement, a list of 17 administrative services -- parts of which beginning May 1, 1971, were furnished by TII, using contracted-for Western Union bargaining-unit employees, as discussed below. Meanwhile, DSC was gradually hiring nonunion support personnel, including office clerical, shop and field technicians, salesmen, etc. These nonunion employees either replaced Western Union's union employees (some of whom were subsequently laid off for lack of work), or were placed in jobs which were comparable to those in Western Union's bargaining unit and which Western Union's union employees would have filled if Western Union had continued to develop all of the terminal-leasing business under its own name.

On May 1, 1971, when TII became operational, it hired (through transfer) most of Western Union's managerial, engineering, and professional staff at the Technology Center in Mahwah. In fact, all 476 of Western Union's P&EO non-bargaining-unit staff (whether located in Mahwah or elsewhere) were transferred en masse to TII. This left without Western Union supervi-

sion the bargaining-unit personnel who were performing not only the support work for the former P&EO staff at Mahwah and other computer centers, but much of the support work for Western Union's other personnel at Mahwah and for DSC's Mahwah personnel as well. Having no nonconfidential support personnel of its own, TII signed one contract (the above-mentioned May 1, 1971 engineering and operating agreement) under which Western Union was to furnish TII a total of up to 208 bargaining-unit "operation and maintenance" personnel, including 25 employees in Mahwah, 26 in Chicago, 21 in San Francisco, 22 in Atlanta, 29 in New York, 64 in Middletown, and 11 to work on Mailgram and 10 on IISS (plus up to 100 weekend test support personnel at Middletown). These bargaining-unit employees included computer technicians, computer consol controllers, intercept operators, a storeroom clerk, and a storekeeper. (Paragraph 20B of the agreement provided that TII "shall direct, manage, and schedule such Telegraph personnel in accordance with and subject to the pro-

visions of the applicable contracts between Telegraph and its collective bargaining units." Under a separate contract (the May 1, 1971 general service agreement), Western Union agreed to furnish TII with additional clerical and other personnel at Mahwah. (G.C. Exh. 21P shows that these were bargaining-unit secretaries, shipping and supplies coordinators, telephone operators, couriers, office messengers, graphic reproduction clerks, and office machine operators.) TII did not offer any of these (whom TII President Finney testified were 18 in number) employment either on May 1, 1971, or nearly 2 years later, when they and some of the other Western Union employees at Mahwah were moved (or offered transfers) to Western Union's new headquarters at Upper Saddle River. Instead, TII began hiring nonunion replacements (in such classifications as switchboard operator, shipping-receiving clerk, mail clerk, reproduction operator, clerk-typist, and lower-level secretary -- G.C. Exh. 188). These nonunion replacements provided support work for TII itself, to the remaining Western Union personnel in

Mahwah (including bargaining-unit employees in the computer center there), and to employees of DSC and WUC, which had their headquarters also at Western Union's Mahwah Technology Center. In addition, TII had been hiring other nonunion support personnel, including clerical and shop employees, to fill jobs comparable to Western Union's bargaining-unit jobs. However, as previously indicated, it did not replace the contracted-for bargaining-unit computer operations personnel with nonunion employees. Instead, after the Union sent its April 17, 1972 letter to Western Union (seeking information about the intercompany contracting, etc.), the decision to have TII manage all of the computer facilities for Western Union was reversed. A large part of TII's operations staff (including 23 managers, 35 supervisors, 3 engineers, and 26 professionals) was returned to Western Union's payroll, and the bargaining-unit support personnel continued to work for the same persons -- but again under the name of Western Union.

When GA finally became operational in 1973, as the latest gift service utilizing

Western Union's facilities, Western Union provided the R/T personnel at the Bridgeton CTB to recieve customer orders, but GA hired a small number of nonunion personnel -- instead of Western Union's union personnel -- to staff the nearby GA service center and office. Pursuant to the policy of keeping bargaining-unit employees on Western Union's payroll, GA hired nonunion employees instead of hiring (or having transferred) Western Union bargaining-unit computer console controllers or systems operators to be GA computer operators, or bargaining-unit monitors to be supervising operators, or Western Union clerks and operators to be GA's service operators, senior service operators, I/O operator, accounts payable clerks, and payroll clerks (bargaining-unit-level employees).

Thus, nonunion employees replaced the union employees who had been performing in the past, and would be performing now, the bargaining-unit support connected with the functions transferred from Western Union to WUC and the four new subsidiaries.

At the time of the May 22, 1973, bargain-

ing request, and at the time of trial, the total number of Western Union bargaining-unit employees replaced by nonunion employees remained relatively small -- when compared to the approximately 10,000 or more employees now remaining in the bargaining unit. In their brief, the Respondents estimate that there are "200 or 300 people" involved in this proceeding. The Union estimates over 300, including the actual or so-called "confidential" employees. The General Counsel has attached to his brief lists of job description comparisons, but does not give an estimate of the total number of nonunion bargaining-unit-level employees hired.

E. Concealment of Nonunion Plans from Union

The Respondents successfully concealed their intentions from the Union until after the 1971 negotiations. (Western Union's 1968 contract with the Union expired on May 31, 1971.)

As one new corporation after another became operational, Western Union's bargaining-unit (union) employees continued performing the bargaining-unit work. Before

May 1, 1971, Western Union furnished this support work directly to WUC, WURC, and DSC through various verbal and written agreements. On that date, as discussed above, the same Western Union employees were still performing the work, but Western Union contracted to supply these union employees to TII, which in turn began furnishing some of the services, even to Western Union itself.

Western Union was well aware of these maneuvers to provide bargaining-unit work for each of the new companies, while keeping the union employees on Western Union's payroll. However, it did not reveal this information to the Union when the 1971 negotiations took place, nor reveal the plans for DSC and TII eventually to replace Western Union bargaining-unit employees with their own nonunion employees.

During the 1971 negotiations, the Union proposed that the new companies be covered by the union contract, stating that the Union considered them to be "nothing but a spin-off" from Western Union. It is undisputed that the Western Union spokes-

man responded, in effect, "You are talking to the wrong man . . . don't talk to me," and stated that the Union would have to talk with someone else. As Union President Beckstead credibly testified, "they just didn't want to talk about it," and "gave us a vague outline of what was involved, but certainly nothing we could base anything on." Some questions were raised about DSC performing some work previously done by Western Union, but as Beckstead credibly testified, the union committee "knew very little about the subsidiary situation." There were other issues, such as the modernization program eliminating bargaining-unit work, which caused a strike (from June 1 to July 26, 1971), but the subsidiary question was not one of the strike issues. (A new 2-year contract was signed, expiring on July 27, 1973.)

On April 17, 1972, as it appeared that some nonunion employees were being hired to perform previously bargaining-unit work, the Union wrote letters to Western Union, WUC, WURC, DSC, and TII regarding

the "corporate proliferation." The letters stated that to some extent, the new corporations "seem to or may be confining themselves to executive or policy functions and personnel," or not employing bargaining-unit employees performing work done under the union contract; "however, some or all of those corporations may very well be planning to exceed and even already be exceeding such confines," causing an impact on "the compensation, job security and other terms and conditions of employment" of Western Union's bargaining-unit employees. The Union requested certain information from Western Union, including intercompany contracting, and more detailed information from the other companies, to enable the Union "to assure the employees whom the Union should represent under the law and the Contract of all of the rights to which they are entitled." Western Union responded, supplying the Union with a considerable amount of information on July 19, 1972 (3 months later), and supplemented the information on January 4 and February 14, 1973. The other corpor-

ations resisted furnishing any information, and the Union filed a charge in an earlier proceeding (Western Union Corporation, Case 5-CA-5620). As that charge was being processed, Respondents WUC, WURC, DSC, and TII (represented then and -- with GA -- at the trial by the same counsel) finally submitted requested information -- between November 20, 1972, and January 12, 1973.

Meanwhile, as the Union was attempting to obtain proof from the new corporations that they were a joint employer with Western Union, the Union began a defensive action, in response to efforts by CWA (which represents Western Union's New York Metropolitan Division) to organize employees hired by the subsidiaries. On July 19, 1972, the Union wrote employees of WURC, DSC, and TII that it was processing an NLRB charge, seeking information "to substantiate our claim" that the Union was their certified bargaining agent; and stating that although "we . . . would have preferred securing recognition through due process of law, we are now confronted with

intervention" by CWA, and "we now are put into the position of having to conduct a campaign asking for your support." The letters continued: "Combine your strength with those 14,000 employees of the Telegraph Company nationwide and we can negotiate a single unit with ultimate bargaining power. Moreover, since these subsidiaries were derived from [Western Union] Departments which were previously represented by the [Union], we are familiar with work content and the problems confronting you." (Emphasis supplied.)

WURC, DSC, and TII campaigned against union representation of their employees, as shown by the responding union campaign literature (introduced into evidence by the Respondents). As the campaign progressed, the Union promised employees of WURC, DSC, and TII that they could "obtain their own charter, elect their own officers, establish their own dues rate and establish their own seniority area," as well as "negotiate their own contract which includes wages, benefits and working conditions." (In representing the nationwide Western Union bargaining unit,

the Union is divided into separate locals, and has different rates and seniority areas.)

On May 22, 1973, the Union wrote a joint letter to Western Union and each of the new companies (WUC, WURC, DSC, and TII), pointing out that a complaint and notice of hearing, issued in the earlier case (5-CA-5620), had alleged that they were "a single integrated enterprise and/or a single employer." The letter requested recognition, which was denied on June 5, 1973 -- by Western Union in one letter and by the other Respondents (through their counsel) in another letter -- asserting that each of the new companies was "separate and distinct" from Western Union. The refusal-to-bargain charge was filed herein on May 31, 1973, and amended on January 30, 1974, to include GA which was added on January 23, 1974, to the Union's request for recognition. Meanwhile, Western Union and the Union signed a 3-year agreement, expiring July 27, 1976. (On July 19, 1973, IBEW Local 3 filed a petition in Case 22-RC-5819, seeking to represent DSC's 35 Mahwah technicians, field

technicians, shop specialists, specialists, and trainees, whom the Union claims are included in the Western Union bargaining unit. That representation case is being held in abeyance, pending the disposition of this proceeding.)

The Respondents contend (1) that the Union, having made and dropped its demand in the 1971 negotiations for recognition as to the subsidiaries, has "impliedly waived" the right to represent subsidiary employees through the existing bargaining unit, and (2) that by engaging in the organizing campaign, the Union "made apparent its understanding" that the bargaining unit included only employees of Western Union. I find it clear, however, that Western Union's concealment of the facts from the Union in 1971 precluded any such implied waiver, and that as quoted above, the Union specifically informed the subsidiaries' employees of its claim that the employees already were represented by the Union as their certified bargaining agent.

I note that in some of its campaign literature, the Union was endeavoring to

organize also the professional (non-bargaining-unit) employees, whose numbers had increased during Western Union's modernization program while the number of bargaining-unit employees was decreasing. Many of the professional employees had been transferred to WUC and the new subsidiaries. However, in view of their exclusion from the bargaining unit, their representation is not involved in the proceeding.

F. Future Fragmentation

When the "corporate restructuring" began in 1969, Western Union issued its September 19, 1969 proxy statement, listing many of its non-FCC-regulated as well as its FCC-regulated services and systems. It did not propose separating all the nonregulated services at once, but indicated that "if and when developments make it advisable, certain non-regulated services and activities" would be furnished by separate WUC subsidiaries.

One holding company and four new subsidiaries were incorporated by 1971. Since then, while this case and the earlier case (seeking information about the intercompany connections) have been in litigation, no additional subsidiaries have been formed from the Western Union structure. (However, there has been a continuing transfer of Western Union non-bargaining-unit employee and management to the new companies, as already shown.)

The Respondents did not reveal at the trial which additional functions they may be planning to transfer from Western Union in the future, or whether Western Union or WUC is planning to permit DSC to take over part or all of Western Union's business of leasing TWX and Telex terminals.

G. Contentions of the Parties

The parties have filed extensive briefs, giving their versions of the facts, and arguing the case from their views of what has happened. Although citing many cases, the parties have not found any direct precedent for deciding this unique case.

The General Counsel, denying that this is an accretion or successorship situation, contends that the facts clearly indicate that the business operations of these new

corporate entities are nothing more than various segments of Western Union's pre-1969 business; that WUC took over Western Union's high level management operations, WURC its real estate operations, DSC its terminal installation and maintenance, TII its planning and engineering operations, and GA its gift-by-wire operations; and that Western Union "either directly or through its former management team as embodied in the parent corporation is involved in every conceivable manner in the operation of the new subsidiary corporations . . . . The only independence that these new corporation subsidiaries will ever enjoy is the freedom from a collective bargaining obligation to their employees if Respondent succeeds in the instant case." The General Counsel contends that after the "corporate reorganization, we are left . . . with nothing more than Western Union . . . under a variety of corporate names," and "an integrated and interrelated enterprise" operating as a "single employer." He insists that all the elements of "common ownership, common management, actual con-

trol of the subsidiaries' operations by the parent company and centralized control over labor relations" are present here in "even greater degree" than in Royal Typewriter Company, a Division of Litton Business Systems, Inc., 209 NLRB No. 174 (1974), in which the Board found a single employer in a conglomerate type corporate arrangement.

The Union contends that it is of fundamental importance in this case that none of the new companies came from outside the Western Union family: "This is not a case of a holding company conglomerate acquiring new corporations which had previously had independent existence. To the contrary, from the start this was an integrated and unitary enterprise." The Union emphasizes that it "seeks no more than the restoration of what has been taken from it. It seeks no accretions. It is strictly on the defensive against Respondents' invasions which have resulted in the decretion of its unit." The Union contends that all the jobs employed by the new companies "reflect loss of jobs to the appropriate bargaining unit," which is vir-

tually nationwide, consisting of over 560 job titles and descriptions, in a continually changing industry. "All the work which is now being performed" by WUC and the four new subsidiaries "was formerly performed" by Western Union.

The Respondents, on the other hand, contend that "While it is true that each of these new enterprises has had some kind of nexus" with Western Union, the traditional bargaining unit has remained intact, "and no bargaining-unit employees has been deprived of Telegraph work or representation" by the Union "by virtue of corporate restructuring. Except in isolated instances, the production, maintenance, and clerical employees of the new companies have been 'off the street' hires." Thus, the Respondents contend, the Union "is not in fact here seeking continuing representation rights respecting employees it has historically represented; rather, it seeks by these proceedings to expand its existing bargaining unit by adding 200 or 300 people whom it has never before represented -- without affording them the opportunity for self-determination." The

Respondents concede that this case "is factually distinguishable from the typical case giving rise to an accretion," and states that the doctrine of successorship "would require radical transformiation" to be applicable. They contend that of the four key elements ("interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control") for finding a "single integrated enterprise," only the element of common ownership is present in this case. However they also argue that even if Western Union, WUC, and the four new subsidiaries do operate as a single integrated enterprise, the newly-hired outside employees should not be included in the Western Union bargaining unit, citing Frank N. Smith Associates, 194 NLRB 212 (1971); Gerace Construction, Inc., 193 NLRB 645 (1971); and Peter Kiewit Sons' Co., 206 NLRB No. 66 (1973). The facts in those three cases (in each of which the Board found that separate union and non-union companies in the construction industry were not a single employer) are clearly inapplicable. The Respondents

further contend that there would be difficulties in fitting the new companies' "specialized employee groups" into the overall Western Union collective-bargaining agreement (despite the fact that the same or similar jobs have long been included in the bargaining unit), and that the FCC requires separate operating personnel for an affiliated data-processing entity (although none of the four new subsidiaries involved in this proceeding is such a separate data-processing entity). They contend that "The new subsidiary corporations are not merely devices for the doing of the same or similar activities under new names; rather, they are the only means by which new and different activities can be undertaken."

H. Single Integrated Enterprise

1. In general

The record, including the thousands of pages of exhibits, is replete with evidence that although Western Union decided in 1969 to transfer some of its nonregulated functions, from time to time, to newly-incorporated nonunion companies,

there was no intention to relinquish the central control over the entire business. The long-term goal was to create a single integrated electronic data communications system, and to have "one nationwide system capable of accepting, handling, transmitting, processing and disseminating messages and data," as already mentioned. A part of the plan, as revealed by Western Union and WUC Board Chairman and President McFall in the WUC 1970 annual meeting report, was "to put terminals in place to serve the communications needs of our customers and then offer data processing or retrieval services as a valuable add-on."

In 1970, three newly-formed companies with "Western Union" in their title, became operational. The first was WUC (Western Union Corporation) which, as a holding company, became Western Union's alter ego for various corporate management and executive functions. The employees of the other two, WURC (Western Union Realty Corporation) and DSC (Western Union Data Services Company, Inc.), remained on Western Union's own payroll for several months

after they became operational. WURC took over Western Union's realty department, and DSC took over part of Western Union's function of putting "terminals in place." As discussed below, their operations were under the tight control of Western Union and/or WUC, as were the operations of TII (which was first incorporated under the name, Western Union Teleprocessing Company, Inc.), to whom Western Union transferred a large portion of its engineering and professional staff the following year. The remaining new subsidiary, GA, was formed to provide the latest of Western Union's instant-gift services. (Outside firms, not involved in this proceeding, were acquired to provide data processing to the public -- supplementing the data processing offered by Western Union in its hybrid-service SICOM and INFO-COM.)

2. Common ownership and financial control

WUC, found above to be Western Union's alter ego for certain corporate management and executive functions, was formed as a holding company with 100 percent of Western Union's common stock as its sole

assets. Western Union became its first subsidiary on January 30, 1970. WURC, DSC, TII, and GA were incorporated by WUC in 1970 and 1971, and are admittedly wholly-owned subsidiaries.

Thus technically, Western Union -- the large communications company with assets of over a billion dollars and annual revenues approaching a half billion dollars -- is a subsidiary of the WUC holding company which, with its small corporate management and executive staff, owns all the stock of the four new companies (as well as interests in acquired firms which are not involved in this proceeding). As a matter of perspective, by the end of 1972 (about 6 months before the original charge was filed herein), the "subsidiary" Western Union still accounted for practically all (about 97 percent) of the consolidated revenues of the entire operation. The WUC 1972 annual report mentioned "the formation of subsidiares from [Western Union's] internal resources" (referring to DSC's "data-terminal leasing," TII's "information system design and engineering," and WURC's "real estate") and "the acquisition

of promising companies." The report then stated that these nonregulated activities represented about 3 percent of "consolidated revenues for 1972."

In addition to this common ownership of Western Union, WUC, and the four new subsidiaries, the evidence shows a great degree of central control over finances.

As reported in the above-mentioned 1972 annual report, WUC has been able to complement Western Union's "efforts in attracting new flows of outside capital" which, over "the past several years . . . has meant an average of $100 million a year." Through the sale of debentures and common stock, WUC raised substantial amounts to assist Western Union in purchasing TWX, paying for the Westar domestic communications satellite system, and prepaying Western Union's bank loans. By September 30, 1973, WUC had made capital contributions to Western Union in the total amount of $197,990,000, and had lent Western Union the outstanding amount of $46,490,000 on a short-term note. (G.C. Exh. 226).

The control over the financing of the four new, wholly-owned subsidiaries was substantially as complete as it would have been if they were technically operating as departments or segments of Western Union.

Concerning WURC, the evidence shows that Western Union and WUC arranged, for example, that Western Union's undeveloped property for a headquarters at Upper Saddle River be sold to WUC, which conveyed it to WURC. Thereupon, WUC President McFall (who was also board chairman of both Western Union and WUC) negotiated in WUC's name, and delivered to WURC, construction agreements for "a building and improvements satisfactory" to WUC and Western Union. Then, WURC obtained a construction loan and a 25-year $14 million mortgage loan, based on a long-term lease to WUC and a sublease to Western Union. (G.C. Exh. 36, 119-121.) The financing of WURC's many other real estate transactions is arranged, guaranteed, or under the tight control of WUC and/or Western Union.

WUC provided for all the initial financing of the next three wholly-owned subsidiaries, DSC, TII, and GA, through pur-

chase of stock, direct or guaranteed loans, guaranty of obligations, or capital contributions. At the time of trial, WUC was guaranteeing about 90 percent of all the obligations of the two larger subsidiaries, DSC and TII, and over 71 percent of the less-successful GA.

3. Common management

Two top officials of WUC (Western Union's alter ego for certain corporate and executive functions) are the chief executive officers of the four new subsidiaries, WURC, DSC, TII, and GA. They are Russell McFall (board chairman and president of WUC, as well as board chairman of Western Union) and Charles Johnston (executive vice president of WUC and former vice president and comptroller of Western Union).

McFall himself (who, as indicated in the Union's brief, "is plainly the dominant personality in the centralized control" exercised over the entire operation) is board chairman of the two larger of the new subsidiaries, DSC and TII, and also a director of WURC and GA. Johnston is board chairman of WURC and GA.

Inasmuch as the four new subsidiaries are wholly-owned by WUC, their respective boards of directors are elected by the WUC directors -- 6 (out of 10) of whom (including McFall), along with Johnston, WUC Vice President-Secretary-General Counsel John Evans, and Western Union President Earl Hilburn, constitute Western Union's entire board of directors. Thus, officers and directors of Western Union and WUC elected the WURC, DSC, TII, and GA directors, virtually all of whom have been officers and/or directors of Western Union and/or WUC. These directors of the subsidiaries have in turn appointed the new subsidiaries' officers, most of whom are former Western Union and/or WUC personnel.

The tight control which Western Union and/or WUC exercises over these subsidiaries is shown by a WUC document (G.C. Exh. 189), issued over the signature of WUC Executive Vice President Gerald Hoyt on May 1, 1971 (the day TII became operational, and when 476 persons were transferred en masse to TII from Western Union). The document states that the TII president (Robert Finney) "is the principal repre-

sentative of the shareowner," WUC, "in the management of the business," but lists "reservations and directions." These include (a) that TII have a "previously approved business plan, and previously approved annual capital, expense and income budgets"; (b) that the appointment and compensation of TII officers "must have prior approval of the Executive Vice President of WUC"; (c) that the "Hiring and compensation of all other employees [emphasis supplied] is to be in accordance with a plan which is one part of the previously approved business plan"; (d) that "All financing, borrowing or investments" and the "purchase or sale of real property or equipment not specifically approved in the annual budget" shall require the "prior approval of the Executive Vice President of WUC and the Vice President of Finance of WUC [then Charles Johnston]"; and that the TII president "will inform the appropriate officers" of WUC "on all matters in addition to the above which in his opinion are of sufficient importance to warrant their attention."

A similar tight control over the operations of DSC was documented in a somewhat different form about 6 months earlier. On November 11, 1970 (about 5 months after DSC became "operational"), at a DSC board of directors meeting -- which was chaired by DSC Board Chairman McFall (also board chairman of Western Union and WUC) -- DSC President Zakarian reviewed the plans for the "transfer" of the DSC employees "from the payroll" of Western Union to DSC on January 1, 1971, and then proposed a similar version of the WUC "restrictions" in the form of a resolution. The restrictions required the DSC president to have the approval of an operating budget by the DSC board (composed entirely of Western Union and WUC officers and directors), and prior board approval of a list of items. These included the "appointment and compensation of all corporate officers," and the "Compensation of all other employees" substantially (as budgeted). The listed items also required "Prior review and approval by WUC Finance Department and WUC General Counsel" of financing plans involving the issuance of corporate securities, "Prior concurrence of WUC Finance Department and

WUC General Counsel" for the lease of real property with annual rental exceeding $25,000, and "Concurrence of WUC Treasurer" for certain investment of funds.

WUC's direct control over the budgets of the subsidiaries is shown by the document entitled, "Policy," issued by Western Union and WUC Board Chairman McFall on April 27, 1972 (G.C. Exh. 21A). The document refers to the required approval of the WURC budget "by the Board of Directors of WUC at their annual budget review meeting." (Emphasis supplied.) The document sets forth real estate policy for WUC and its subsidiaries; lists various WURC services which are "to be used by each subsidiary" in all real estate matters; and then demonstrates WUC's control over the subsidiaries' budgets by providing: "WUC will provide these services for all of its subsidiaries and no charge will be made to the subsidiaries' operating budgets for this service." (Emphasis supplied.)

Other documents in evidence also show the central control exercised by Western Union and/or WUC over the four new subsidiaries' operations -- in addition to

the centralized control over labor relations, discussed later. The minutes of WUC's August 25, 1970 board meeting report that WUC President McFall had a general discussion of WUC's "business plan for the rearrangement of its operations among existing subsidiaries and those under consideration and study." Later, as previously indicated, DSC President Zakarian repeatedly complained that DSC's terminal-leasing business was adversely affected by competition from Western Union. However the decision was made (apparently by Western Union and/or WUC) that Western Union itself would continue leasing the "alternate DAA/TWX terminals." In 1972, shortly after the Union questioned the relationship and intercompany contracting among the various WUC corporations, the boards of both Western Union and WUC decided to transfer TII Operations Division General Manager Charles Scott back to Western Union (making him a Western Union vice president), and as previously indicated, Scott was thereafter followed by his entire 93-person former TII staff, who were likewise transferred to Western Union

-- apparently upon the decision of Western Union and/or WUC. Similar control over the activities of the subsidiaries is shown by WUC President McFall's statement; in the January 8, 1974 WUC board minutes, "that from time to time employees of the Corporation [WUC] have been and will be transferred to various subsidiaries of the Corporation in order to satisfy special requirements of other subsidiaries and utilize to the maximum the talents and abilities of the Corporation's employees." (Extensive transfers among the companies are discussed later.)

At one point in his testimony, TII President Finney conceded that WUC has "management control" over TII and the other wholly-owned subsidiaries. He testified that this was the same control which TII in turn exercised over two of WUC's acquired companies:

> A . . . . The way this control is exercised, in each case I am chairman of the board of the acquired companies. And members of my staff are board members of the acquired companies. And we have planning, integration and technical review type functions within the TII as part of exercising this management control . . . . All the financial reporting of [the acquired company] to its owner, Western Union Corporation, is done through my controller . . . . [If it] desires to develop a new system or put in a new site, this requires a technical approval within TII . . . . The board of directors of these corporations are elected of course by the stockholders, the sole stockholder being the Western Union Corporation . . . . The board of directors elected the chairman and the officers and establish the delegation of authority involved to the officers.

It was "in that sense" that he conceded that WUC exercised management control over TII and the other subsidiaries. However, as shown, the control of Western Union and/or WUC over the four new subsidiaries is more pervasive.

4. Central control of labor relations policies

The evidence shows that directors and officials of Western Union and WUC do not simply have potential control over the labor relations and personnel policies of WURC, DSC, TII, and GA -- through the selection of the directors and officers of each of those new subsidiaries. The evidence shows that they take an active part

in the formulation of those policies, through active participation in board meetings and otherwise.

One of the mechanics for the exercise of this common control over labor relations policies is the above-mentioned control by WUC over the budgets of the four subsidiaries. As specifically stated in the May 1, 1971 document issued by WUC when TII became operational, the hiring and compensation of all employees, other than officers, must be in accordance with a previously approved business plan, which is required along with previously approved annual capital, expense, and income budgets. Western Union and WUC Board Chairman McFall's own April 27, 1972 "Policy" statement refers to WUC's "annual budget review meeting."

Western Union and WUC made the common decision that when each of the new subsidiaries was formed -- by transferring Western Union personnel and functions to it -- only non-bargaining-unit personnel (managers, professionals, and "confidential" employees) would be offered transfers. Western Union's bargaining-unit employees

(represented by the Union) would -- at least initially -- perform the accompanying support work, but only through contractual arrangements.

The new subsidiaries were not permitted to decide upon such matters as fringe benefits for the transferred employees, or to administer the plans themselves. The transferred employees were included in the benefit plans of Western Union which, in January 1971, caused WUC to be substituted for Western Union as the named insurer by the insurance companies. WUC adopted a separate pension plan for itself and the new subsidiaries, providing similar benefits and giving credit for Western Union service. In the absence of collective bargaining, WUC sought outside advice on future fringe benefits for itself and the new subsidiaries, and decided upon coverage quite similar to Western Union's, and which included the pooling of experience with Western Union. The subsidiaries adopted the recommended plans, with certain changes. However, as disclosed by the minutes of the March 2, 1972 DSC directors' meeting, the plan adopted by DSC

"had been reviewed with the Employees Benefits Committee of Western Union Corporation and . . . while . . . not exactly the same as the plan of the parent, it is substantially similar thereto and the variations had been approved by the [WUC] Benefits Plan Committee." (Emphasis supplied.)

Not only does WUC "recommend" fringe benefit plans for the four new subsidiaries and approve variations, but Western Union plays a significant part in controlling this part of the labor relations policies. Western Union provides a centralized claims administration for "WUC and subsidiary companies" for life, hospital-medical-surgical benefits, major medical expenses, long term disability, travel accident, insured and self-insured workmen's compensation, and statutory non-occupational disability benefits. It processes all the claims, for which it charges the respective companies. (G.C. Exh. 24.)

Under this close control by Western Union and/or WUC over the labor relations and personnel policies, WURC, DSC, TII, and GA -- in the absence of collective bar-

gaining with the Union -- have established some new job titles for the bargaining-unit-level jobs. Pointing our that TII's job classifications (in G.C. Exh. 11) bear the date of September 1972 (a date after the charge was filed in the earlier case but before WUC and the new subsidiaries submitted requested information), the Union states in its brief that the job classifications "were apparently created for the purpose of providing information in the previous Board case." I need not decide whether the different titles were deliberately adopted to give the impression that the jobs are different from Western Union bargaining-unit jobs, because I find that the bargaining-unit-level work being performed by employees of the new companies is virtually the same as Western Union's bargaining-unit work.

5. Interrrelation of operations

The operations of Western Union and the five other Respondents are interrelated to a marked degree. They have interchanged goods and services in amounts totaling many millions of dollars; they have interchanged personnel by the hundreds; they

have shared headquarters and used common facilities; they have performed related work and have dealt with the public as segments of a unified buisness; and, apart from the mass of intercompany contracting, they have operated much like separate departments rather than independent businesses.

As previously discussed, there were large-scale transfers of functions and non-bargaining-unit personnel from Western Union to the new companies, which had neither the facilities and "capabilities," nor (because of the nonunion transfer policy) the union support personnel, to perform the functions. Through a variety of oral and written arrangements, Western Union provided the facilities, services, and support personnel. In payment therefor, Western Union charged the other Respondents the following amounts between 1970 and 1973 (G.C. Exh. 203): $6,959,709 to WUC; $1,096,730 to WURC; $8,239,533 to DSC; $9,886,728 to TII; and $1,126,542 to GA. Thus, Western Union's total charges to the new companies during that period were $27,309,242. These charges continue

to be extensive, totaling $3,069,119 to the five companies in 1973. (Cf. G.C. Exh. 24.) Meanwhile, WUC was making charges to Western Union and the other subsidiaries in amounts totaling also in the millions of dollars; there have been large intercompany charges among the new subsidiaries themselves; and TII's charges to Western Union for the transferred P&EO work (particularly the TII work on the Middletown and Bridgeton computer centers) have amounted to even larger sums -- including an estimated $22 million in 1974.

There has been much interchange of personnel among the six Respondents. Between 1971 and 1973, there were 44 transfers of Western Union personnel to TII (in addition to the 476 transferred to TII on May 1, 1971, when TII became operational); 53 from TII to Western Union (in addition to the 93 transferred to Western Union following the transfer back of the TII official, Charles Scott); 3 from TII to DSC; and 5 from TII to WUC. (G.C. Exhs. 186-187). Other intercompany transfers have been 83 from Western Union to DSC, 2 from Western Union to TII to DSC, 21

from DSC to Western Union, and 3 from DSC to TII (G.C. Exh. 165); 27 transfers from Western Union to GA, 4 from WUC to GA, 1 from TII to GA, 5 from GA to Western Union, 1 from GA to WUC, and 1 from GA to TII (G.C. Exhs. 197-199); and 24 transfers from Western Union to WURC, and 2 transfers back (G.C. Exh. 152). With few exceptions, these transfers involved managers, professionals, and actual or so-called "confidential" employees. Because of the nonunion transfer policy, the interchange of bargaining-unit-level employees was primarily limited to special contractual arrangements, as when Western Union contracted to provide TII with the services of hundreds of union employees. (As previously mentioned, TII agreed under one intercompany contract with Western Union to direct and manage the union employees under the union agreement, and under another arrangement, agreed to process first-step grievances of Western Union employees at Mahwah.)

WURC shared Western Union's headquarters in New York until Western Union moved its headquarters to Upper Saddle River in

1973. WUC (after it moved its headquarters from New York) has had its headquarters at the Western Union Technology Center in Mahwah, where DSC and TII have their headquarters. GA's headquarters has been moved from Mahwah to Western Union's headquarters in Upper Saddle River.

At Mahwah, where employees of Western Union, WUC, DSC, and TII eat in the same cafeteria, there has been common use of some supplies and facilities. An example is the computer center in building 1. Western Union has two computer rooms there, on either side of a communication room. Western Union operates its SICOM and IISS systems from one of the rooms (the communication room providing the connections with the outside). TII manages the other computer room as a developing laboratory, under contract with Western Union; and TII has a key punch and library facilities which, in turn, Western Union also uses under contract with TII. As credibly testified by Charles Magee, a Western Union (bargaining-unit) chief computer technician, Western Union personnel usually work on the "Western Union side" and

TII personnel on the "TII side," but they interchange from time to time, and the person called in on Saturday may work on both sides. (However, when the Western Union personnel do maintenance work on the "TII side," the development lab, they are technically maintaining Western Union equipment, as testified by TII President Finney.) I note that Magee was one of those who was on Western Union's payroll and doing Western Union computer operations work, but supervised by TII, during the period of over a year when the management of the computer operations work was performed by TII.

The interrelations of operations at Mahwah in 1971 and 1972 is illustrated by the testimony of Jacqueline Auriansen, who began working there in late 1971 for DSC as an employment-agency temporary employee. At that time, there was a larger staff of Western Union employees at Mahwah, but the supervisors had been transferred to TII. In early 1972, TII supervisor John Knight offered Auriansen a Western Union bargaining-unit job, and gave her an application. After she was hired by West-

ern Union, she was supervised by TII supervisor Knight, and assigned at different times to work in each of the four buildings at the Mahwah center, performing mail services for Western Union, WUC, DSC, TII, and GA.

Meanwhile, the five new companies have been performing integral parts of Western Union's business. WUC is performing much of Western Union's corporate management and executive functions. It prepares the elaborate consolidated annual reports (containing consolidated financial reports, eliminating the intercompany transactions), which are furnished to stockholders to supplement Western Union's remaining skeletal reports of its separate activities. It plays a significant role in raising funds for Western Union.

WURC, also operating with "Western Union" in its title, likewise constitutes an integral part of Western Union. It handles the real estate transactions necessary for Western Union, and the new companies fragmented from it, to have offices, operating centers, warehouse, etc., in which to do business.

DSC -- which prominently displays Western Union's well-known "WU" logo with the "Western Union" part of its name (Western Union Data Services Company, Inc.) in its advertisements (R.W. Exh. 39) -- is providing an essential part of Western Union's plan of putting terminals in place and then offering data processing. It not only is expanding Western Union's telephone-circuit terminal-leasing business, but it has taken over parts of Western Union's telegraph-circuit business. As demonstrated in the April 10, 1972 issue of the Western Union Telegraph Company News (G.C. 26-A), DSC and Western Union emphasized their unified operation in selling the new Datacom telegraph-circuit network to Crown Zellerbach. Where Western Union provided the transmission service and DSC (instead of Western Union) provided the 120 terminals (to be maintained by Western Union under contract with DSC), this was reported as "a testimonial to the Single Vendor concept of sales and services."

TII, from whose name the words "Western Union" were removed before it was activated, advertises as a subsidiary of

"Western Union Corp.," or as "Western Union's Teleprocessing Industries, Inc.," a "Western Union subsidiary." (R.W.36.) Since it became operational on May 1, 1971, most of its activities have been continuing the former role of Western Union's P&EO department, designing and engineering Western Union's modernization program. But even its long-term goal of providing such services to the public is an integral part of Western Union's plans for creating a single integrated EDC system.

Finally GA, whether or not it proves viable, is the latest of many instant-gift services, using Western Union facilities (the central telephone bureau in Bridgeton), and utilizing the services of Western union R/T personnel, who are instructed to explain, if asked, that GA "is a subsidiary of Western Union which has been in the gift business . . . for many years.

Yet, despite the foregoing evidence of interrelation of operations, and additional evidence detailed in the prior discussion of the fragmentation of Western

Union, the Respondents contend in their brief that "Respondent Companies' Operations Are Not Interrelated"; that "While mutually convenient and beneficial relationships do exist among the companies, the performance of services . . . is always compensated in accordance with the formality of written agreements"; that there has been shown on substantial or significant interchangeability among the employees, just temporary service by employees remaining on Telegraph's payroll; that the "various occurrences . . . which might superficially resemble inter-corporation transfers are fully explained"; and that there is "no basis whatsoever for holding that all or any number" of the "other Western Union companies" constitute "with Telegraph a single employer."

To the contrary, I find that the record is replete with evidence of such interrelation of operations.

Having found that the General Counsel has fully established an interrelation of operations, centralized control of labor relations, common management, and common ownership and financial control, I find

that Western Union, WUC, WURC, DSC, TII, and GA are a single integrated enterprise, and that despite the fragmentation of Western Union, it and the five new companies constitute a single employer for purposes of collective bargaining.

I. Concluding Findings

As Western Union's modernization and computerization program progressed, resulting in a decline in the number of employees in the virtually nationwide, certified bargaining unit, Western Union began in 1970 transferring some of its non-FCC-regulated functions to newly-incorporated nonunion companies, while continuing to operate the business as a single integrated enterprise. It not only failed to give prior notice to the Union, but it concealed from the Union the plans to operate the new companies on a nonunion basis until after the 1971 collective-bargaining negotiations.

The fragmentation of Western Union, called "corporate restructuring," began with the incorporation of four new Delaware corporations, each including "Western Union" in its name. They were the hold-

ing company, WUC (Western Union Corporation), WURC (Western Union Realty Corporation), DSC (Western Union Data Services Company, Inc.), and a fourth company, first named Western Union Teleprocessing Company, Inc. On January 30, 1970, Western Union itself became a subsidiary of the holding company, WUC, which then had the same 13 directors as Western Union, dual officers, and assets consisting solely of Western Union's stock. Thereafter, the three other Delaware corporations were incorporated by WUC, and became its wholly-owned subsidiaries. WURC and DSC became operational in May and July 1970, before efforts were made to give an appearance of separation. However in 1971, before the mass transfer of Western Union's P&EO (planning and engineering operation) functions and personnel to the fourth new corporation, and before the union-contract negotiations began, some steps were taken "to separate the operations." Some dual offices were eliminated in February 1971 (when several WUC and DSC officials resigned their Western Union positions, and the Western Union president

resigned his WUC position), and the words, "Western Union" were thereafter dropped from the name of the fourth new corporation before it was activated on May 1. (It was renamed Teleprocessing Industries, Inc., or TII). Nevertheless, as previously found, Western Union, WUC, the first three new subsidiaries, and another wholly-owned subsidiary, GA (GiftAmerica, Inc., which WUC incorporated in 1971 and which became operational on September 1, 1973), continued to be operated as a single integrated enterprise.

The method used to enable the first four new corporations to operate on a nonunion basis, without alerting the Union before the 1971 negotiations, was for the Western Union non-bargaining-unit personnel to be transferred to each of the new corporations as "a technical resource," while Western Union provided the necessary facilities, services, and bargaining-unit (union) support personnel to carry on the operations. Many of the intercompany contractual arrangements were on a verbal basis. Western Union did not sign any of the written arrangements until after the

February 1971 "separation" of the operations. Several of the intercompany agreements were dated back from about 9 months to over a year, and one (the Western Union-DSC January 1971 FAS agreement) provided that most of its provisions would terminate nearly 3 months before it was signed. Task orders for Western Union to provide various services were sometime submitted months after the work was begun. The informality of the intercompany arrangements is also shown by the fact that "transferred" non-bargaining-unit personnel remained on Western Union's payroll for months after WURC and DSC became operational. (At the time of the 1973 collective-bargaining negotiations, after the Union became aware of some of these intercompany arrangements and as its members were being replaced by nonunion bargaining-unit-level employees working for the new companies, the Union sought to bargain for the certified, overall unit. Western Union and the new companies refused, asserting that they were "separate and distinct" companies.)

Western Union gave various reasons for

the "corporate restructuring." These stated reasons included the limited scope of Western Union's New York corporate charter, FCC regulations and restrictions, competitive advantage, and financing flexibility. And at the trial, a further reason was given by the TII president, who revealed the desire for TII -- by taking over the Western Union P&EO department's work of completing Western Union's huge computer centers at Middletown and Bridgeton -- to earn sufficient profits on the fees it charged Western Union to give TII the "financial base" for seeking new outside business. Apart from the last reason, as previously discussed, the evidence suggests considerable doubt about whether there was any necessity for the first four subsidiaries (WURC, DSC, TII, and GA) being established as separate corporate entitles. (WURC still acts primarily as Western Union's real estate department. DSC, with its 14,000 leased terminals, is partly in competition with Western Union, which is leasing about 115,000 terminals. TII is performing activities which Western Union otherwise would be pursuing.

And GA has been offering the latest of Western Union's instant-gift services.) However, the issue is not whether the fragmentation of Western Union was necessary, or a good business practice. The issue is whether the overall certified bargaining unit has remained intact.

Having found from all the evidence that Western Union and the five new companies are a single integrated enterprise, despite the fragmentation of Western Union, and that they constitute a single employer for purposes of collective-bargaining, I find that the certified bargaining unit remains intact, including employees on the payrolls of Western Union, WUC, WURC, DSC, TII, and GA.

In making this finding, I have duly considered the Respondents' contention that if the "single integrated enterprise" doctrine is applied herein, "the 200 or 300 employees," who are "off the street" new hires of their respective employers, "will never be able to make their own choice of bargaining representative." Of course, the free choice of employees for or against union representation is of

importance. However, in this unique case -- not involving either an accretion or a successorship situation, but instead involving a fragmentation of a certified bargaining unit -- I find that the preservation of the bargaining unit, and the rights of the bargaining-unit employees whose employment rights are placed in jeopardy by the unit fragmentation are, in balance, of greater importance.

Accordingly I find that Western Union, WUC, WURC, DSC, and TII since June 5, 1973, and also GA since January 30, 1974, unlawfully refused to acknowledge and recognize the Union as the collective-bargaining representative of their employees in the certified bargaining unit, in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. By refusing on and after June 5, 1973, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the certified bargaining unit, Western Union, WUC, WURC, DSC, TII, and GA engaged in unfair labor practices affecting commerce within the meaning of Section

8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The certified bargaining unit consists of all production, operations, maintenance, technical, and clerical employees of The Western Union Telegraph Company in the continental United States, but excluding all employees in the New York Metropolitan Division, guards, and professional, managerial, and confidential employees within the meaning of the Act.

3. Western Union, WUC, WURC, DSC, TII, and GA constitute a single employer for purposes of collective bargaining, and their employees are included in the certified bargaining unit.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find it necessary to order the Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Union contends that the bargaining order should cover not only the new subsidiaries, WURC, DSC, TII and GA,

but any such other subsidiary corporations which Western Union and WUC may create in the future from a department or segment of Western Union. However I find unnecessary, at this time, to anticipate a further unlawful refusal to bargain.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[2]

ORDER

Respondents, Western Union Corporation, Western Union Data Services Company, Inc., and Teleprocessing Industries, Inc., Mahwah, New Jersey; The Western Union Telegraph Company and GiftAmerica, Inc., Upper Saddle River, New Jersey; and Western Union Realty Corporation, New York, New York; their officers, agents, successors, and assigns, shall:

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2. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to bargain collectively with United Telegraph Workers, AFL-CIO, as the exclusive collective bargaining representative of their employees in the following-described certified bargaining unit; provided, however, nothing herein shall, during the term of the "1973 Contract Agreement" (signed on August 2, 1973), authorize or direct any of the Respondents to vary or abandon, without the concurrence of the Union, any of the wages, benefits, or conditions of employment established for any of their employees in this bargaining unit:

> All production, operations, maintenance, technical, and clerical employees of the Respondents in the continental United States, but excluding all employees in the New York Metropolitan Division, guards, and professional, managerial, and confidential employees within the meaning of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action

necessary to effectuate the policies of the Act:

(a) Upon request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described certified bargaining unit and embody in a signed agreement any understanding reached.

(b) Post at all their offices and other facilities where notices to bargaining-unit employees are customarily posted, copies of the attached notice marked "Appendix."[3] Copies of the notice on forms provided by the Regional Director for Region 5, after being duly signed by Respondents' respective authorize representatives, shall be posted by the Respondents immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted.

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3. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C.

/s/ Marion C. Ladwig
Marion C. Ladwig
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board having found, after trial, that we are a single integrated enterprise and a single employer for purposes of collective bargaining, and that we violated Federal Law by refusing to bargain for all of our employees in the certified bargaining unit:

WE WILL NOT refuse to bargain with UNITED TELEGRAPH WORKERS, AFL-CIO, as the exclusive representative of all of our employees in the certified bargaining unit, which consists of:

> All of our production, operations, maintenance, technical, and clerical employees in the continental United States, but excluding all employees in the New York Metropolitan Division, guards and professional, managerial, and confidential employees within the meaning of the Act.

WE WILL, upon request, bargain with the Union in good faith. However, WE WILL NOT, during the term of the "1973 Contract Agreement" (signed on August 2, 1973), vary or abandon, without the concurrence of the Union, any of the wages, benefits, or conditions of employment of any of our employees.

WESTERN UNION CORPORATION By _____

THE WESTERN UNION TELEGRAPH COMPANY By _____

WESTERN UNION REALTY CORPORATION By _____

WESTERN UNION DATA SERVICES COMPANY, INC. By _____

TELEPROCESSING INDUSTRIES, INC. By _____

GIFTAMERICA, INC. By _____
Rep. Title

Dated _____

Supreme Court, U. S.
FILED
JUL 29 1978
R., CLERK

No. 77-1683

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED TELEGRAPH WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutory provisions involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's decision	9
C. The court of appeals' decision	11
Argument	11
Conclusion	14

CITATIONS

Cases:

Carterfone, 13 F.C.C. 2d 420	4
Local Union No. 627, International Union of Operating Engineers v. *National Labor Relations Board*, 518 F. 2d 1040	12
Oil, Chemical and Atomic Workers Union, Local 4-243 v. *National Labor Relations Board*, 362 F. 2d 943	13
Radio Union v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255	11
South Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800	11, 12
Western Union Telegraph Company, 58 NLRB 1283, modified, 61 NLRB 110	3

Statute: Page

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2

Section 8(a)(1) 9
Section 8(a)(5) 9

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1683

UNITED TELEGRAPH WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 571 F. 2d 665. The decision and order of the National Labor Relations Board (Pet. App. 25a-54a) are reported at 224 NLRB 274.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1978. The petition for a writ of

certiorari was filed on May 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Western Union Telegraph Company and its parent and four subsidiary corporations do not constitute a single employer for purposes of the National Labor Relations Act.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

A. The Board's Findings of Fact

The Western Union Telegraph Company ("Telegraph") has operated for many years as a common carrier of record communications (Pet. App. 27a).[1] Telegraph's business is regulated by the Federal

[1] In addition to the familiar telegram, Telegraph's services include teleprinter exchange services (Telex and TWX), in which a subscriber can communicate with any other subscriber by attaching his teleprinter terminal (obtained from Telegraph or from an independent company) to Telegraph's transmission lines; and private wire services, in which a customer is provided with a customized internal communications system (Tr. 621-623, 630-635, 396-397).

"Tr." refers to the transcript of the Board hearing; "GCX," to the General Counsel's exhibits; and "RWX," to respondents' exhibits.

Communications Commission, and its prices are determined according to specified "tariffs," which must be approved by the FCC (Pet. App. 27a; Tr. 618-619, 630-632, 657-661; RWX-27).[2] Since 1945, petitioner Union has been the certified bargaining representative of a unit of Telegraph's employees throughout the United States (with the exception of the New York Metropolitan division in which another union was certified) (Pet. App. 60a-61a).[3] Telegraph and the Union negotiated contracts for this unit of Telegraph employees in 1968, 1971, and 1973 (Pet. App. 164a, 166a, 170a; Tr. 389-394; GCX-41, -42, -43).

In the mid-1960's, because its mechanical transmission facilities had become obsolete and worn out, Telegraph had to undertake a billion dollar Modernization Program to replace its existing system with computerized electronic facilities capable of handling telegram transmission as well as the newer services (see n. 1, *supra*) in a single integrated system (Pet. App. 27a; Tr. 646-647, 675-676, 781-782, 784-786).

[2] Telegraph also provides several minor untariffed services as incidental adjuncts to its record communications business. It sells special teleprinter paper to its Telex and TWX customers, performs maintenance on communications equipment under separate maintenance contracts, and delivers candy (and formerly other gift items) supplied by an outside company along with a tariffed telegram under its "Candygram" scheme for promotion of telegram services. (Pet. App. 35a-36a; Tr. 635-636, 679-680, 686-687, 689-692.)

[3] See *Western Union Telegraph Company*, 58 NLRB 1283, modified, 61 NLRB 110.

At the same time, the profitability of Telegraph's business began to decline significantly as demand for telegraph services was increasingly undermined by competition from new, technologically advanced communications systems offered by unregulated companies (Tr. 638, 647-648, 654-656). In addition, the FCC's *Carterfone* decision[4] eliminated Telegraph's monopoly over the sale and lease of terminals for attachment to its own transmission lines; as a result, independent companies could sell or lease terminals for attachment to Telegraph's lines on an untariffed, unregulated basis, while Telegraph was required to continue leasing its terminals, on request, exclusively on a tariffed basis (Pet. App. 67a-68a; RWX-23, Tr. 640-646). These developments persuaded Telegraph that, in order to continue being profitable to its investors, it would have to diversify its business into new, unregulated areas (Pet. App. 27a; Tr. 656).

There were, however, three obstacles to Telegraph's diversification plans. First, Telegraph's New York corporate charter, and the New York Transportation Corporations Law which regulated it, precluded Telegraph from engaging in any business other than telegraph communications (Pet. App. 27a-28a; Tr. 657-659, RWX-27).[5] Second, Telegraph had committed its entire financing capability to the Modernization Pro-

[4] 13 F.C.C. 2d 420.

[5] The New York Public Service Commission actively enforced this restriction, rejecting, as *ultra vires*, Telegraph's attempt to acquire a news release distribution company called P.R. Newswire (Pet. App. 73a; Tr. 660-661; GCX-39, p. 14).

gram, and was therefore unable to finance any new business ventures without undermining its communications services. Finally, in order to prevent common carriers from subsidizing nonregulated services with income from regulated services by commingling costs, the FCC had effectively prohibited common carriers from engaging in unregulated data processing activities, except through separate corporations which operated separately (Pet. App. 28a, 35a, 71a-73a; RWX-24A, -24B, -25, -26).

Accordingly, in 1970, Western Union Corporation ("WUC") was incorporated in Delaware as a holding company. Unlike Telegraph, WUC had a broad corporate charter, was not a common carrier subject to FCC regulation, and had no contractual limitations on its financing capabilities. WUC acquired all of the voting stock of Telegraph in exchange for shares in WUC, and then began to invest in the unregulated businesses which were unavailable to Telegraph, both by acquiring existing companies[6] and by establishing new ones (Pet. App. 28a, 74a; Tr. 653-654, 656, 659, 662-663). During 1970, WUC established Western Union Data Services Company ("DSC") to compete with about one hundred other independent hardware leasing companies engaging in the unregulated terminal leasing business opened up by the *Carterfone* decision (*supra*, p. 4), and Western Union Realty Corporation ("WURC") to engage in the real estate

[6] One of WUC's first acquisitions was P.R. Newswire, which the New York Public Service Commission had refused to allow Telegraph to acquire (Tr. 660-661; GCX-39, p. 14).

business, conducting its own land investment and development program as well as selling its property management services to the public (Pet. App. 28a-29a; Tr. 665, 988-989, 999-1002, 1100-1101; GCX-16, -18, -21A, -21B, -23A, -148, -152, -154). In 1971, Teleprocessing Industries, Inc. ("TII") was established to sell information and data processing systems and services to the public (Pet. App. 28a; Tr. 791-795, 858-870).[7] In 1973, GiftAmerica ("GA") was activated to engage in the unregulated business of selling and delivering gift merchandise through franchised dealers by means of both over the counter sales and a centralized national telephone ordering service (Pet. App. 28a; Tr. 713-715, 734-741).[8]

Telegraph conducted business with the new corporations pursuant to detailed formal contracts, each company being fully compensated for services rendered to each other (Pet. App. 31a). Telegraph leased office space, along with related administrative services such as mail distribution and document reproduction, to some of the other corporations, as well as to non-affiliated companies, pursuant to formal leases (Pet. App. 31a, 32a; GCX-21C, -21H, -21I, -21K, -21L, Tr. 113-115, 221- 222, 280-283, 310-311, 474-477). DSC subcontracted some of its terminal installation and maintenance work to several com-

[7] TII was also responsible for coordinating the activities of other data-processing firms which WUC had acquired (Tr. 847-857).

[8] GA soon proved unsuccessful and ceased operations in August of 1974 (Pet. App. 28a).

panies, including Telegraph, on a competitive basis (Pet. App. 31a-32a; Tr. 1007-1014).[9] GA contracted for support services with several companies, including Telegraph, which furnished a telephone answering service paid for on a per call basis (Pet. App. 33a; Tr. 719-720, 734-738, 740, 745, 753). Telegraph hired TII to complete its Modernization Program, which included managing the new computer installations until they were operating smoothly and training people to operate these installations; Telegraph thereafter assumed the management of these systems (Pet. App. 32a-33a; Tr. 788-790, 795-805, 954, GCX-21J). For a time, Telegraph was one of DSC's terminal customers (Pet. App. 32a; 1010-1011, 1017, 1020-1021), and Telegraph was one of WURC's tenants and a customer of WURC's property management services (Pet. App. 33a-34a; GCX-21B, -23A).

Each corporation has its own board of directors, which conducts its own meetings and makes its own business decisions (Pet. App. 38a; GCX-77-147, -155-160, -166-177, -180-191, -204-218). The daily management of each corporation, including the conduct of its employee relations, is handled by its own president and other officers with designated areas of responsibility (Pet. App. 38a-39a, 41a-42a; Tr. 706-707, 719, 847-848, 898-905, 926-927, 965-966, 1022, 1028-1030, 1070, 1074-1076; GCX-4, -8, -16, -163, -168, -189 (3rd page)). Although there are some

[9] DSC also purchased warehousing space as well as some administrative services from Telegraph and from other companies (Tr. 1011-1013, 1102-1105).

individuals who serve as officers or directors in more than one of the corporations, none of the corporate presidents has any position with any of the other companies, and none of Telegraph's eighteen officers has any position with any other company (Pet. App. 29a-30a; GCX-4 (p. 3), -8 (last page), -12 (p. 7), -16 (p. 4), -248).

Telegraph's employee relations (including relations with the Union) are handled by its Vice President for Employee Relations, G. P. Kent, and his assistant, Robert J. Lackey, neither of whom has any position with any of the other corporations (Pet. App. 30a, 41a-42a; Tr. 413, 459, GCX-21, -24G, -26 (h), -49, -53, -248). TII has its own employee relations department headed by its own manager of employee relations (GCX-8, pp. 1, 3); DSC's president and vice president handle its labor relations (GCX-12, p. 3); WURC's president and vice president for administration handle its labor relations (GXC-16, p. 3); and WUC's president and vice president for finance are responsible for its labor relations policies (GCX-4, p. 2). Each corporation established its own labor relations policies, and, after a short transitional period, each adopted its own fringe benefits plans, which are different from Telegraph's (Pet. App. 41a; GCX-4, -8, -12, -16, -20, -42, -43, RWX-12). Each corporation also conducted its own hiring program, determining for itself which functions it would obtain from subcontractors and which would be performed by its own employees (Pet. App. 31a-32a; Tr. 835-838, 955-959, 1011-1015, 1022-1024).

No bargaining unit employees were transferred from Telegraph to any of the new corporations, but the new corporations did not refuse to hire former Telegraph employees who applied for work with the new companies (Pet. App. 153a; Tr. 1027-1030, 1033-1034, 1105-1107, 1118-1127).

On May 23, 1973, the Union requested all of the new corporations to recognize it as the bargaining representative of their employees (Pet. App. 170a; GCX-48). The Union made no claim that a majority of the new corporations' employees wanted the Union to represent them. When all of the new corporations refused to recognize the Union, the Union filed a charge with the Board alleging that all of the new corporations constituted a single employer with Telegraph, and that their refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (Pet. App. 170a).

B. The Board's Decision

The Board (with one Member dissenting) concluded, contrary to the Administrative Law Judge (ALJ), that "each corporation is a separate and independent entity and that, therefore, [Telegraph's] bargaining obligations have no application to WUC or WUC's other four subsidiaries" (Pet. App. 27a). Accordingly, the Board dismissed the unfair labor practice complaint (Pet. App. 42a-43a).

In so concluding, the Board found, contrary to the ALJ, that "the creation of the holding company and the four new subsidiaries has not fragmented [Tele-

graph's] business or had an adverse impact on [Telegraph's] bargaining unit." For, "[w]hile each of these new corporations has some nexus with [Telegraph], their businesses, which are unregulated, had not existed as part of [Telegraph] and had, therefore, not been performed by [Telegraph's] bargaining unit employees"; indeed, "the functions of the other subsidiaries could not have been performed by [Telegraph], since it was limited by its New York charter and FCC regulations to providing record communication services pursuant to tariff and subject to regulation by the FCC." (Pet. App. 34a-35a.)[10]

The Board also noted that, under settled principles, "a critical factor in determining whether separate legal entities operate as a single employing enterprise is the common control of labor relations policies and that common ownership is not determinative where such requisite common control is not shown"; moreover, "such common control must be actual or active, as distinguished from potential control" (Pet. App. 37a; footnotes omitted). The Board found that "[n]o such common control of labor relations is present herein"; indeed, "of the four key elements essential to a finding of a 'single integrated enterprise'—common ownership and financial control, common management, interrelation of operations, and centralized control of

[10] The Board further found that the ALJ had erred in finding that [Telegraph] "did engage in untariffed activities." For, the various "untariffed services" to which he referred "were only incidental to tariffed communications or services." (Pet. App. 35a.)

labor relations—only common ownership is present here" (Pet. App. 38a; footnote omitted).

C. The Court of Appeals' Decision

A divided court of appeals affirmed the Board's decision, concluding that the Board's findings "were amply supported by substantial evidence in the record" (Pet. App. 3a).[11]

ARGUMENT

In finding that Telegraph and the new corporations do not constitute a single employer for purposes of the Act, the Board applied the criteria which have been approved by this Court, *i.e.*, "interrelation of operations, common management, centralized control of labor relations and common ownership." *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800, 802, n. 3; *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256. The court of appeals found that the Board had correctly applied these principles and that its findings were supported by substantial evidence. In these circumstances, no issue warranting review by

[11] The dissenting judge "agree[d] with the court that substantial evidence supports the Board's conclusion that the elements of single employer status have not been established" (Pet. App. 16a), but he would have remanded the case to the Board to consider whether the "alter ego" and "successorship" doctrines were relevant. However, as the court noted (Pet. App. 6a-7a), the only issue raised in the proceedings before the Board and the court of appeals was whether the four criteria for determining single employer status were met here.

this Court is presented. *South Prairie Construction Co., supra*, 425 U.S. at 803-804, n. 5.

Contrary to petitioner's contention (Pet. 17-19), the court of appeals reached a different conclusion here than it did in *South Prairie, supra*, not because of a different standard of review,[12] but because the facts of the two cases are different, as the Administrative Law Judge himself noted (Pet. App. 177a). Thus, in *South Prairie*, the court of appeals found that the parent had activated a nonunion construction subsidiary in the same area of business as another construction subsidiary which had a contract with the union, for the purpose of competing in that area without the burden of a union contract. And, the nonunion subsidiary actually took business opportunities from the union firm, thus preempting work that would have been covered by the union contract. See *Local No. 627, International Union of Operating Engineers* v. *National Labor Relations Board*, 518 F. 2d 1040, 1043, 1049 (C.A.D.C.). In contrast, the Board concluded

[12] While, in *South Prairie*, the court stated that it was relevant to determine "whether, as a matter of substance, there is the 'arm's length relationship found among unintegrated companies,' " it recognized that " 'single employer' status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case," [and] that not all of the 'controlling criteria' specified [in *Radio Union* v. *Broadcast Services of Mobile, Inc., supra*] need be present * * *." *Local Union No. 627, International Union of Operating Engineers* v. *National Labor Relations Board*, 518 F. 2d 1040, 1045-1046 (C.A. D.C.). In any event, the Board's findings (*supra*, pp. 6, 9-11) show that there was an "arm's length relationship" among Telegraph and the other corporations.

here, in findings sustained by the court of appeals, that the new companies were established for legitimate business reasons having nothing to do with the Union, that they engaged in new businesses unavailable to Telegraph, and that they did not interfere with Telegraph's business or perform work which would otherwise have been done by Telegraph's employees.[13]

[13] The Board in finding, contrary to the ALJ, that Telegraph's unregulated activities were merely incidental to its regulated telegraph business (n. 2, *supra*), did not upset the ALJ's credibility determinations, but merely differed as to the conclusions to be drawn from the evidential facts. There is accordingly no merit to petitioner's suggestion (Pet. 20-21) that the Board's reversal of the ALJ was improper. See *Oil, Chemical and Atomic Workers Union, Local 4-243* v. *National Labor Relations Board*, 362 F. 2d 943, 946 (C.A.D.C.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270109 80

Supreme Court, U. S.
FILED
JUL 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1977

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UNITED TELEGRAPH WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

—and—

WESTERN UNION CORPORATION; TELE-PROCESSING INDUSTRIES, INC.; WESTERN UNION DATA SERVICES COMPANY, INC.; WESTERN UNION REALTY CORPORATION; GIFTAMERICA, INC.; THE WESTERN UNION TELEGRAPH COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT THE WESTERN UNION TELEGRAPH COMPANY

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
COUNTER-STATEMENT OF QUESTION PRESENTED	3
COUNTER-STATEMENT OF THE CASE	3
REASONS FOR NOT GRANTING THE WRIT:	
The decision of the Court of Appeals conforms to the decisions of this Court	7
CONCLUSION	11

Cases Cited

Carterphone, 13 F.C.C. 2d 420 (1968)	5
GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973)	5
Local 627, International Union of Operating Engineers v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975), aff'd in relevant part and remanded on other grounds sub nom. South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, 425 U.S. 800 (1976)	6, 9, 10
NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951)	8
NLRB v. Walton Manufacturing Company, 369 U.S. 404 (1967)	8, 9
Radio and Television Broadcast Technicians Local 1264 v. Broadcast Serv., 380 U.S. 255 (1965)	6
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950)	7, 9

PAGE

Statutes Cited

National Labor Relations Act, as amended:
Sec. 5 5
Sec. 8 2
Sec. 8(a)(1) 4, 5
Sec. 8(a)(5) 4, 5
New York Transportation Corporations Law 4, 5
28 U.S.C.:
Sec. 1254(1) 2
29 U.S.C.:
Sec. 141 ..... 2, 4
Sec. 158 2
Sec. 158(a)(1) 5
Sec. 158(a)(5) 5

Regulation Cited

47 C.F.R.:
Sec. 64.702 (c) (1), (2), (3) 5

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Respondents.

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BRIEF FOR RESPONDENT THE WESTERN UNION TELEGRAPH COMPANY

Opinions Below

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit issued on February 25, 1978 and is reported at 571 F.2d 665. The June 1, 1976 Decision of the Respondent National Labor Relations Board ("Board") is reported at 224 NLRB 274 (1976). The Decision of the Administrative Law Judge ("ALJ"), issued on January 10, 1975, is included (save for the Appendix) in the Board Decision, at 224 NLRB 279. Each of the foregoing is set forth in the Appendix ("App."). *infra.*

Jurisdiction

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on February 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

The pertinent statutory provision is the following in Section 8, 29 U.S.C. §158, of the National Labor Relations Act, as amended, 29 U.S.C. §§141 *et seq.* ("Act").

> "(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; • • •
>
> "(5) to refuse to bargain collectively with the representative of his employees • • •."

Counter-Statement of Question Presented

Whether this Court should review the holding of the Court below that there was substantial evidence to support the decision of the National Labor Relations Board that the Western Union Telegraph Company is not a "single employer" with the Western Union Corporation, Teleprocessing Industries, Inc., Western Union Data Services Company, Western Union Realty Corporation and GiftAmerica, Inc.?

Counter-Statement of the Case

This case comes before this Court on a Petition for a Writ of Certiorari filed by the United Telegraph Workers, A.F.L.-C.I.O., hereinafter ("Petitioner" or "U.T.W."), seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit upholding a decision of the National Labor Relations Board that Respondents herein do not constitute a "single employer" for collective bargaining purposes and therefore certain of the Respondents cannot be subject to Telegraph's bargaining obligations with Petitioner.

The material facts are essentially as stated in the Decision and Order of the Board and Opinion of the Court of Appeals (Petition at pp. 1a-8a and 25a-43a).

The Respondents herein are a holding company, Western Union Corporation, and five of its subsidiaries—The Western Union Telegraph Company, Western Union Data Services Company, Inc., Teleprocessing Industries, Inc., GiftAmerica, Inc., and Western Union Realty Corporation.

Petitioner, United Telegraph Workers, A.F.L.-C.I.O. has, since 1945, represented and still represents the produc-

tion, operation, maintenance and clerical employees of Respondent, The Western Union Telegraph Company (hereinafter "Telegraph"). The U.T.W. claims it also represents the employees of the holding company and four new subsidiary corporations as well as Telegraph and charged these corporations with refusal to bargain in violation of Section 8(a)(5) and 8(a)(1) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 141, *et seq.*

For many years Telegraph's business primarily consisted of the transmission of information in record form. Prior to the Second World War and for a period thereafter, the telegram was the dominant element in Telegraph's business; since then new forms of information, including data transmission, private wire and Telex, have achieved a dominant position in Telegraph's business. In the 1960's it became apparent that the means of transmission in use at that time were greatly in need of modernization. To this end Telegraph began to replace its existing system with a system which utilized electronic-computer technology.

At the same time Telegraph recognized the need to expend and diversify and looked for areas where it could best utilize its equipment and expertise in the field of record communications. In considering the areas in which it could move, Telegraph necessarily had to consider the restrictions placed on it by its charter (Telegraph is a New York corporation) and the New York Transportation Corporations law, which made it impossible for Telegraph to merge or incorporate in another state. This, standing alone, would have dictated a new corporate structure if entry into the rapidly growing field of the use of computer technology to handle data processing were to be possible.

In addition, Telegraph necessarily had to consider the actions of the Government agency which regulates its affairs; namely, the Federal Communications Commission (hereinafter "FCC"). The FCC had begun in 1966 to investigate the relationship of the computer industry and its impact upon the regulated communications industry. In the so-called "Computer Inquiry" the FCC barred access of regulated companies to certain computer-generated business except with restrictions imposed by the FCC.[1] For this reason, and it is uncontroverted in the record, the formation of a non-regulated company or companies was necessary. The Board correctly recognized the business necessity for the formation of the other Respondents, the restrictions of Telegraph's charter, the New York Transportation Corporations Law, the effect of the decisions of the FCC in *Carterphone,* 13 F.C.C. 2d 420 (1968), and the "Computer Inquiry". The Court of Appeals found substantial evidence in the record to support the Board's finding.

Petitioner claimed to represent the employees of the new subsidiary and demanded that all Respondents bargain with it as a representative of their employees and this demand was refused. Petitioner, therefore, filed an unfair labor practice charge with the National Labor Relations Board, asserting that the six corporations (Telegraph and WUC and its four new subsidiaries) constituted a "single employer" for the purpose of collective bargaining and that these corporations (except Telegraph) had unlawfully refused to recognize and bargain with it in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158 (a)(1) and (5). The Board majority found that each of the six

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[1] *GTE Service Corp.* v. *FCC,* 474 F.2d 724 (2d Cir. 1973); 47 C.F.R. §64.702 (c) (1), (2), (3).

corporations is a separate and independent entity and that the several corporations do not constitute a "single employer".

It also found that, after their formation, each of the new subsidiaries entered into new, unregulated, business activities in which Telegraph was prohibited from acting and without effecting any change in the operation of Telegraph's business as theretofore conducted. Moreover, the traditional Telegraph bargaining unit remained intact within Telegraph. No Telegraph bargaining unit employee was deprived of Telegraph work or of representation by the Petitioner. Contrary to Petitioner's suggestion (Petition at pp. 4-8), Telegraph bargaining unit employees were not transferred to the new businesses (Petition at pp. 34a-35a). The production, maintenance and clerical employees of the new subsidiaries were new hires. Telegraph bargaining unit employees were not, as claimed by Petitioner (Petition at pp. 34a-35a), transferred to the new business. The Court of Appeals held that there was substantial evidence in the record to sustain each of the Board's findings, all of which were adverse to Petitioner.

On the critical tests for determining "single employer" status, e.g., common ownership, centralized control of labor relations, common management and interrelations of operations,[2] the Board concluded that only one, common ownership, was present in this case. Therefore, the Board held that Petitioner had failed to demonstrate that Respondents were a "single employer".

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[2] See *Radio and Television Broadcast Technicians Local 1264* v. *Broadcast Serv.*, 380 U.S. 255, 256 (1965) (per curiam), quoted with approval in *South Prairie Constr. Co.* v. *Local 627, IUOE*, 425 U.S. 800, 802 & p. 3 (1976).

Accordingly, the Board held that Telegraph's bargaining obligations "had no application" to WUC or the four new subsidiaries and dismissed the Complaint (Petition at p. 42a). In so doing it rejected the Recommended Order and Decision of the Administrative Law Judge.

The Court of Appeals found that the Board's findings are "amply supported by substantial evidence in the record" and has affirmed the Board's decision (Petition at p. 3a). Chief Judge Bazelon dissented, not from the Court's holding that the Board's conclusion that the several corporations do not constitute a single employer was based upon substantial record evidence (Petition at p. 16a), but what he considered to be the Board's failure to consider whether an "alter-ego" or "successorship" doctrine is relevant (Petition at pp. 11a-12a). He would have remanded the case to the Board despite the fact, as discussed by the majority of the Court, that this case was litigated throughout on the "single employer" theory (Petition pp. 6a-7a).

REASONS FOR NOT GRANTING THE WRIT

The decision of the Court of Appeals conforms to the decisions of this Court.

Petitioner's argument is essentially that the Court of Appeals did not apply the proper standard for review of the decision of the Board (Petition pp. 19-22). On the contrary, the Court of Appeals correctly followed the holding of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1950). There this Court laid down the rule that, where there is sufficient evidence on the record as a whole to support agency finding, this Court will intervene only when the Court of Appeals appears to have misapprehended or grossly misapplied the standard of

review which Congress has placed in the keeping of the Court of Appeals.

There is no warrant for Petitioner's assertions (Petition pp. 18, 20) that the Court below did not genuinely consider the record in this case or that it rubber stamped the Board's decision. Granted that the opinion of the Court below was succinct, it nevertheless clearly met Petitioner's arguments and disposed of them in a well-reasoned opinion. After all, the Court below did not need to write a lengthy opinion to dispose of a case in which the applicable law was well established.

There is no showing that the Court below either misapplied or misapprehended the standard for review of the Board order and therefore under *Universal Camera* the Petition should be denied.

Petitioner further attempts to have this Court, as it attempted to persuade the Court of Appeals to do, to substitute its judgment for that of the Board and reinstate the recommended decision of the Administrative Law Judge. However, as this Court has held, *NLRB* v. *Walton Manufacturing Company,* 369 U.S. 404 (1967), a reviewing Court may not displace the Board's choice between two fairly conflicting views even though the reviewing Court could justifiably have made a different choice had the matter been before it *de novo.* This Court also will not usurp the primary responsibility which Congress has placed on the Courts of Appeals to grant or deny enforcement of a Board order, *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

There has been no showing by Petitioner that the Court below did not properly discharge its responsibility for reviewing the Board's order. The only difference between the majority and the dissent in the Court of Appeals was the belief of the dissent that the case should be remanded

for further consideration by the Board. The dissent did recognize that there was substantial evidence to support the Board's conclusion that the elements of a "single employer" status had not been established. It is respectfully submitted that nothing in the law or the facts of this case justifies remand to the Board for further consideration.

Contrary to the Petitioner's argument (Petition pp. 17-18) it is apparent that, not only did the Court of Appeals follow the directions of this Court in *Universal Camera Corp., supra* and *Walton Manufacturing Company, supra,* but it likewise followed this Court's holding in *Local 627, International Union of Operating Engineers* v. *NLRB,* 518 F.2d 1040 (D.C. Cir. 1975), *aff'd in relevant part and remanded on other grounds sub nom. South Prarie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976).

There the Court of Appeals was called upon to consider "single employer" status under the National Labor Relations Act and it held that such status depended upon all of the circumstances of the particular case. This Court, 425 U.S. at p. 803, affirmed that holding. Such a holding, of course, limits the precedent value of any case. The holding here that there was not a "single employer" rests on the particular facts of this case, facts which are so unique, given the regulated status of Telegraph, that its application to the broad field of labor relations has to be extremely limited. It is obvious, therefore, that this case does not present an issue of general importance in the field of labor relations and it is inconceivable that it constitutes, as Petitioner contends (Petition p. 16) "a text for evasion of the Act".

Petitioner also contends that the decision below conflicts with the Court of Appeals' own holding in *South*

Prairie is also without merit. In *South Prairie,* unlike the present case, there was a common control of labor relations policies, the absence of which in this case the Court of Appeals considered critical. The Court of Appeals found there was substantial evidence in the record to support the Board's finding that there was not common control of labor relations. The evidence showed that each Respondent controlled its own labor relations and Telegraph's Vice President in charge of its labor relations held no office or directorship in any of the other corporations.

In addition, in *South Prairie* the Court of Appeals found that *South Prairie* was formed as a non-Union employer to undermine the Union there involved, an anti-Union *animus* which the Court of Appeals found to be absent in this case. That being so, the decision of the Court of Appeals in this case is consistent with its decision in *South Prairie* and, likewise, is consistent with prior decisions of other Courts of Appeals as well as this Court. It is respectfully submitted that this case presents nothing more than a request by Petitioner for this Court to review factual determinations and standards of law already determined by the Board and the Court of Appeals and for which there was substantial evidence in support thereof in the record. There is nothing in this case that merits review by this Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Dated: July 19, 1978.

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Supreme Court, U. S.
FILED
JUL 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1683

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

—and—

WESTERN UNION CORPORATION; TELEPROCESSING INDUSTRIES, INC.; WESTERN UNION DATA SERVICES COMPANY, INC.; WESTERN UNION REALTY CORPORATION; GIFTAMERICA, INC.; THE WESTERN UNION TELEGRAPH COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS WESTERN UNION CORPORATION, TELEPROCESSING INDUSTRIES, INC., WESTERN UNION DATA SERVICES COMPANY, INC., WESTERN UNION REALTY CORPORATION, AND GIFTAMERICA, INC.

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
COUNTER-STATEMENT OF QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
1. This case involves no issue of general importance and the Judgment below does not conflict with any holding of the Court below or any other Court of Appeals	5
2. The decision below is not in conflict with decisions of this Court prescribing the standards for judicial review of an agency decision	9
CONCLUSION	10

Cases Cited

American Federation of Television and Radio Artists v. NLRB (Hearst Corporation), 462 F.2d 887 (D.C. Cir. 1972)	7
Bachman Machine Company v. NLRB, 226 F.2d 599 (8th Cir. 1959)	8
Gerace Construction, Inc., 193 NLRB 645 (1971)	7
GTE Service Corporation v. FCC, 474 F.2d 724 (2d Cir. 1973)	4
J.G. Roy & Sons Company v. NLRB, 251 F.2d 771 (1st Cir. 1958)	7

PAGE

Local 627, International Union of Operating Engineers v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975), aff'd in relevant part and remanded on other grounds sub nom. South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, 425 U.S. 800 (1976) 5-10

Los Angeles Newspaper Guild, Local 69 (Hearst Corp.), 185 NLRB 303 (1970), enf'd, 443 F.2d 1173 (9th Cir. 1971), cert. denied, 404 U.S. 1018 (1972) 7

Miami Newspaper Printing Pressmen's Local 46 v. NLRB, 322 F.2d 405 (D.C. Cir. 1963) 7

NLRB v. General Teamster, Warehouse and Dairy Employees, Local 126, 435 F.2d 288 (7th Cir. 1970) 7

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 6

Radio Union v. Broadcast Services of Mobile, Inc., 380 U.S. 255 (1965) 7

San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541 (9th Cir. 1969) 7

Universal Camera Corporation v. NLRB, 340 U.S. 474 (1951) 9

Statutes Cited

National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*:

Sec. 8(a)(1) 4

Sec. 8(a)(5) 4

PAGE

New York Transportation Corporations Law 6

Sec. 2[illegible] 3

Regulation Cited

47 C.F.R.:

Sec. 64.702(g) 4

IN THE

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BRIEF IN OPPOSITION FOR RESPONDENTS WESTERN UNION CORPORATION, TELEPROCESSING INDUSTRIES, INC., WESTERN UNION DATA SERVICES COMPANY, INC., WESTERN UNION REALTY CORPORATION, AND GIFTAMERICA, INC.

Opinions Below

The Decision and Order of the National Labor Relations Board (hereinafter the "Board") issued on June 1, 1976 and is reported at 224 NLRB 274. The Opinion of the United States Court of Appeals for the District of Columbia Circuit issued on February 24, 1978 and is reported at 571 F.2d 665.

Counter-Statement of Question Presented

Whether this Court should review the holding of the Board and the Court of Appeals that Western Union Corporation and its four new subsidiaries do not constitute with The Western Union Telegraph Company a "single employer," that holding being supported by substantial evidence.

Counter-Statement of the Case

The material facts are essentially as stated in the Decision and Order of the Board (Petition at pp. 25a-43a) and Opinion of the Court of Appeals (Petition at pp. 1a-8a).

Petitioner, United Telegraph Workers, AFL-CIO, at all relevant times represented and still represents the production, operations, maintenance, and clerical employees of Respondent The Western Union Telegraph Company (hereinafter "Telegraph"). It seeks to expand its representation status to include the 200 to 300 additional employees of Respondent Western Union Corporation (hereinafter "WUC") and its four new subsidiaries, Teleprocessing Industries, Inc. (hereinafter "TII"), Western Union Data Services Company, Inc. (hereinafter "DSC"), Western

Union Realty Corporation (hereinafter "WURC") and GiftAmerica, Inc. (hereinafter "GA").[1]

In their respective opinions below, the Board and the Court of Appeals extensively discussed the applicable facts and law; they concluded that WUC, the four new subsidiaries, and Telegraph do not constitute a "single employing enterprise." Accordingly, both the Board and the Court of Appeals held that Telegraph's bargaining obligations do not concern WUC or the new subsidiaries.

Telegraph, the oldest of the corporate entities and the only one with which the Petitioner has ever had a bargaining relationship, is engaged exclusively in the business of providing record communications services pursuant to tariff and subject to the regulation of the Federal Communications Commission (hereinafter the "FCC"), as well as state agencies. During the 1960's, Telegraph experienced a marked decline in its traditional telegraph business. In an attempt to offset its declining business, Telegraph explored diversification in unregulated markets. However, upon completion of an intensive study of its charter limitations and FCC restrictions, it concluded that it was limited to the operations of telegraph-related business (Petition at pp. 27a-28a).

Specifically, under Section 25 of the New York Transportation Corporations Law Telegraph is limited to the operation of an electric telegraph business. Moreover, FCC rulings in cases collectively referred to as the "computer inquiry" require that any unregulated, *i.e.*, nontariffed, activities be conducted by separate corporate

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[1] For convenience, these four companies are sometimes hereinafter referred to as the "new subsidiaries."

entities.[2] The FCC's holding was upheld by the U.S. Court of Appeals for the Second Circuit in *GTE Service Corporation* v. *FCC,* 474 F.2d 724 (2d Cir. 1973).

Each of the new subsidiaries entered into a new unregulated business activity, one in which Telegraph was prohibited from acting, and without effecting any change in the operation of Telegraph's business as theretofore and presently conducted. Moreover, the traditional Telegraph bargaining unit remained intact within Telegraph. No Telegraph bargaining unit employee was deprived of Telegraph work or of representation by the Petitioner. Contrary to Petitioner's suggestion (Petition at pp. 4-8), Telegraph's bargaining unit employees were not transferred to the new business (Petition at pp. 34a-35a). Except in isolated instances, the production, maintenance, and clerical employees of the new subsidiaries were hired "off the street."

Petitioner in its unfair labor practice charge asserted that the six corporations constitute a "single employer" for the purpose of collective bargaining, and that these corporations (except Telegraph) had unlawfully refused to recognize and bargain with it in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (5). The Board in dismissing the Complaint held that each of the six corporations is a separate and independent entity; that the several corporations do not constitute a "single employer." Accordingly, it held that Telegraph's bargaining obligation relates only to its own employees; that it does not

[2] While focusing primarily on the separation of commercial data processing from the tariffed communications business, the FCC made clear that it was also prohibiting companies from commingling any regulated and unregulated business. 47 C.F.R. § 64.702(g).

extend to employees of WUC or the four new subsidiaries (Petition at p. 42a).

The Court of Appeals affirmed, holding that the Board's findings are "amply supported by substantial evidence in the record" (Petition at p. 3a). Although Chief Judge Bazelon dissented, he agreed that the Board's conclusion that the several corporations do not constitute a single employer is based upon substantial record evidence (Petition at p. 16a).[3]

Reasons for Denying the Writ

1. This case involves no issue of general importance and the Judgment below does not conflict with any holding of the Court below or any other Court of Appeals.

In support of its Petition, Petitioner contends that due to the "manifest public importance of Western Union and of its business," the decision below will constitute "a text for evasion of the Act, unless this Court speaks" (Petition at p. 16). Petitioner also contends that the Judgment below cannot be reconciled with the decision of the same Court in *Local 627, International Union of Operating Engineers* v. *NLRB,* 518 F.2d 1040 (D.C. Cir. 1975), *aff'd in relevant part and remanded on other grounds sub nom. South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) (hereinafter referred to as *"South Prairie"*). Both arguments are misplaced.

[3] He would remand to the Board to consider whether an "alter-ego" or "successorship" doctrine is relevant (Petition at pp. 11a-12a, 24a) notwithstanding that, as noted by the majority of the Court, the parties "rested their case before the ALJ on the 'single employer' rationale." (Petition at p. 6a, n. 8)

As the Court of Appeals stated in *South Prairie,* "'single employer' status, for purposes of the National Labor Relations Act, depends upon all of the circumstances of the case" (518 F.2d at 1045). The peculiar circumstances involved in the present case ill suit the role of a "text for evasion of the Act," as Petitioner claims. Telegraph could not have embarked upon new, unregulated businesses such as those in which the new subsidiaries engage, and the new subsidiaries could not and do not engage in the regulated business of Telegraph. The operation of WUC and the four new subsidiaries as businesses separate and distinct from Telegraph is required by the New York Transportation Corporations Law and FCC regulations. Under the circumstances, it is difficult to conceive of how the decision below stands as a precedent for use by other employers, except, perhaps, one in the same or similar type of regulated business in which Telegraph is engaged—if any such exist, which is hardly likely.

Petitioner contends that the decision below conflicts with this Court's holding in *South Prairie.* On the contrary, it is in total harmony with that decision. In *South Prairie,* this Court, following its prior decision in *NLRB* v. *Pittsburgh S.S. Co.,* 340 U.S. 498 (1951), refrained from disturbing the holding of the Court of Appeals below on the "single employer" issue, noting that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders." 425 U.S. at 804 n. 5, citing *NLRB* v. *Pittsburgh S.S. Co., supra,* at 502. The opinion in *South Prairie* leaves no doubt that the Court of Appeals did precisely what it concluded was required for a determination of "single employer" status, namely, considered "all the circumstances" before holding that the respondents therein, Kiewit and South Prairie,

were a single employer for purposes of the National Labor Relations Act. 518 F.2d at 1047.

Here, the Court of Appeals and Board examined all of the circumstances in light of the "single employer" criteria enumerated in *Radio Union* v. *Broadcast Services of Mobile, Inc.,* 380 U.S. 255 (1965), and made their separate determinations that the "single employer" doctrine does not apply. Those criteria are interrelation of operations, common management, centralized control of labor relations, and common ownership. Here, the Board found that only one of the four elements, common ownership, is present, and as to it, that there is not the "actual or active" control criticized by the Board and the Courts of Appeals. See, *e.g., Gerace Construction, Inc.,* 193 NLRB 645 (1971); *American Federation of Television and Radio Artists* v. *NLRB (Hearst Corporation),* 462 F.2d 887 (D.C. Cir. 1972); *San Francisco-Oakland Newspaper Guild* v. *Kennedy,* 412 F.2d 541, 545 (9th Cir. 1969); *Miami Newspaper Printing Pressmen's Local 46* v. *NLRB,* 322 F.2d 405 (D.C. Cir. 1963); *J.G. Roy & Sons Company* v. *NLRB,* 251 F.2d 771, 773-74 (1st Cir. 1958); *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.),* 185 NLRB 303 (1970), *enf'd,* 443 F.2d 1173 (9th Cir. 1971), *cert. denied,* 404 U.S. 1018 (1972).

The Board and Court holdings below that the mere existence of common ownership does not result in "single employer" status are in accord with the holding in other circuits in which the question has arisen. See, *e.g., NLRB* v. *General Teamster, Warehouse and Dairy Employees, Local 126,* 435 F.2d 288, 291 (7th Cir. 1970); *Bachman Machine Company* v. *NLRB,* 226 F.2d 599 (8th Cir. 1959). Here, the Board also found that none of the other indicia of "single employer" is present, and the Court of Appeals found that the Board's findings are based upon substantial

record evidence. Petitioner points to nothing of substance which indicates the contrary.

South Prairie presents circumstances entirely absent here. There, a non-union employer (South Prairie) was formed for the avowed purpose of undermining the Union's jurisdiction. Its creation threatened the continued Oklahoma operations of the pre-existing unionized counterpart (Kiewit). Here, there is a total absence of anti-union *animus* or purpose in the formation of WUC and the four new subsidiaries.

Another critical factor present in *South Prairie* but here absent is that of common control of labor relations policies.

The Court of Appeals decision in *South Prairie* was a necessary response to a specific fact pattern wholly absent in the instant case. The instant findings and conclusions of the Court of Appeals for the District of Columbia affirming the holding of the Board are consistent with *South Prairie* and the prior decisions of this Court as well as of other Courts of Appeals that have addressed the question. There are no special or important reasons for review.

In sum, the sole issue—whether the several companies shall be deemed to constitute a single enterprise for collective bargaining purposes—has been resolved on the basis of substantial evidence and does not merit review by this Court.

2. The decision below is not in conflict with decisions of this Court prescribing the standards for judicial review of an agency decision.

Although Petitioner further contends that the Court of Appeals below did not properly review the decision of the Board, it points to no specific inadequacy in the review process, and for the good reason that there was none.

Petitioner's contention is that the Board declined to accept the recommendations and conclusions of the Administrative Law Judge. However, Petitioner ignores the fact that the Administrative Law Judge's decision was based on material facts which are no different from those considered by the Board. The differences Petitioner elects to highlight are the Board's analysis and in the inferences drawn by the Board from the facts found by the Administrative Law Judge. But, it is not improper for the Board to draw different factual inferences than those drawn by the Administrative Law Judge, nor to draw different conclusions of law in its application of controlling legal principles. The Board's findings do not detract from the substantial evidence standard, and particularly where, as here, credibility of witnesses was not a significant factor. *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474, 496-97 (1951).

Petitioner's contention that the decision of the Court of Appeals below "is one that does run contrary to the language and tenor of the Act, and is a rubber-stamp affirmance of a Board decision which is inconsistent with the statutory mandates" (Petition at p. 20) is simply unsupported rhetoric inconsistent with the record. Even Chief Judge Bazelon, while dissenting on other grounds, agreed with the majority "that substantial evidence supports the Board's conclusion that the elements of single employer status have not been established" (Petition at p. 16a).

As this Court pointed out in *South Prairie, supra,* Congress has charged the Courts of Appeals with the normal and primary responsibility for granting or denying enforcement of Board orders. 425 U.S. at 803-4. Both the majority and the dissenting opinions in the Court of Appeals leave no doubt that the Court properly exercised and discharged its responsibility in the case *sub judice.* For this reason alone, the Writ should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Dated: July 24, 1978.

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